INTRODUCTION

TO

THE STUDY OF LAW

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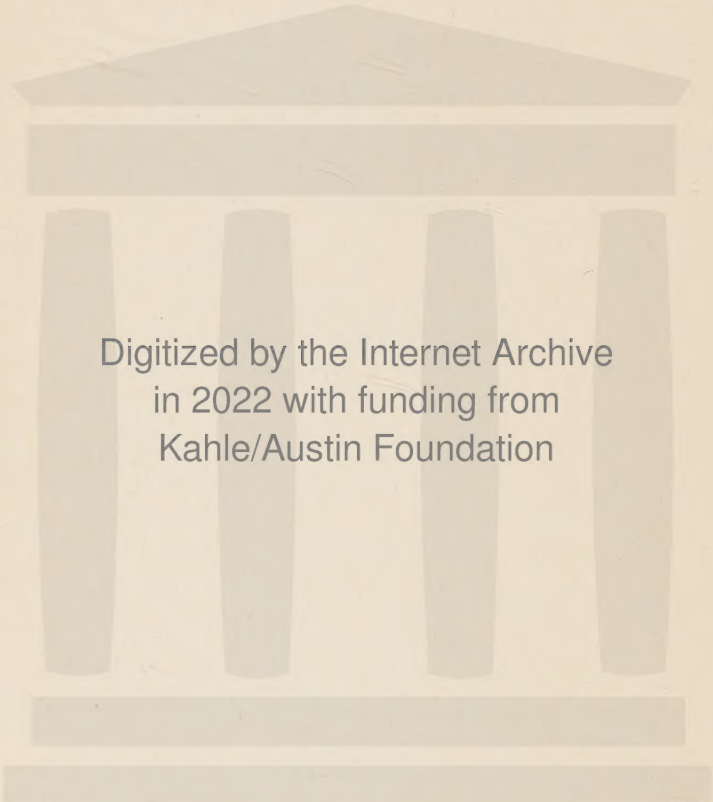

The Study of Law

CHAPTER I

THE COURTS

What Is Law? To attempt in an elementary treatise to answer a question upon which jurists and legal scholars cannot agree would be not only presumptuous but futile. Definitions too numerous to recite, much less to discuss, have been framed by writers of greater or less learning, and some of them have been enunciated with all the modesty of omniscience. It has been confidently asserted that the law is made up of the edicts of the legislative agencies of society plus a body of pre-existing principles which its judicial agencies have but to discover and apply. The law has been said to consist of the commands of the sovereign. With greater approach to reality it has been declared to be merely "a statement of the circumstances in which the public force will be brought to bear upon men through the courts."[1] But a definition, accurate and universally applicable, has yet to be made. What the beginning student needs is not such an ideal definition but a working hypothesis, and for that purpose he may well accept the statement of Pollock and Maitland, that the law "may be taken for every purpose, save that of strictly philosophical inquiry, to be the sum of the rules administered by courts of justice."[2] This Gray virtually

[1] Mr. Justice Holmes in American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. In an article distinguished for the scholarly modesty with which matters of opinion are expressed, Mr. Zane, with charming disregard for realities and equal devotion to abstractions, demonstrates to his entire satisfaction the hopeless absurdity of this dictum and the blind stupidity of the other justices in allowing Mr. Justice Holmes to beguile them into an appearance of approving it. 16 Michigan Law Review at 345-6.

[2] 1 Pollock and Maitland, History of English Law, XXV.

adopts when he says that the law of a state "is composed of the rules which the courts * * * lay down for the determination of legal rights and duties."[3] The acceptance of this hypothesis necessitates an inquiry into the composition and functions of courts, and this in turn requires a brief consideration of the origin and development of the English judicial system as well as a description of the existing system in the United States.

ENGLISH COURTS[4]

Curia Regis. Just prior to the Norman conquest England was covered with a network of local assemblies or courts in which the administrative and judicial business of the local units was largely done. In these justice was administered for the ordinary citizen. Men of high degree had resort to the King and Witan. In the King and Witan lay also a large residuary power over matters normally within the jurisdiction of the local courts. This system the Norman Kings nominally accepted. The Curia Regis seemed a mere continuation of the Witan, its composition necessarily modified by Norman feudalism. Like the Witan, it was a legislative, administrative and judicial tribunal. Like the Witan it might have functioned as the central organ of a decentralized government. By strong and skilful exercise of the kingly prerogative, which William I and his successors claimed through Edward, the Confessor, it was transformed into an enormously powerful machine of centralized authority. On its judicial side it was the feudal court for tenants-in-chief of the Crown. But it was more; it was the central judicial tribunal of the realm. The reserve power which the Anglo-Saxon King and Witan had possessed over local courts vested in the Norman King and his Curia Regis. Not for long did it lie unused. Of course, the local courts remained the usual tribunal for ordinary cases, but royal delegates might be sent to preside over them when occasion required; by royal writ causes might be evoked from them. And royal interference was frequent enough

[3] Gray, Nature and Sources of Law (2 ed.), 84.

[4] In preparation of this section the following have been freely consulted: 1 Holdsworth, History of English Law (3 ed.); Pollock and Maitland, History of English Law (2 ed.); Adams, Origin of the English Constitution.

to dispel any notion that it was to be regarded as a merely theoretical possibility. Indeed judicial history under the Norman and Angevin Kings is a story of constantly increasing power and jurisdiction of the royal courts and a corresponding decay of the local tribunals.

The Curia Regis was composed of the king's tenants-in-chief, his important officials and others whose presence and assistance he desired. So large a body could not be kept in constant session and was too unwieldy to attend to the ordinary affairs of the kingdom. Much of the work had to be delegated. Consequently a smaller council composed mainly of the king's high officials, gradually took over the every-day business of government. As the powers of kingly control were more extensively exercised and the duties of royal officials correspondingly increased, there was an inevitable tendency to division of labor and specialization of function. This was as true of judicial as of other work. Thus by delegation of duties and by differentiation of function there was evolved from the Curia Regis a system of tribunals especially charged with the administration of royal justice.

Itinerant Justices—Justices in Eyre.[5] By sending delegates of the Curia Regis through the kingdom the central government was able to exercise control over local affairs. Through these delegates royal business of all sorts was done,—by them information for Domesday Book was collected, royal finance was administered and royal justice dispensed. In the early Norman period their visitations were uncommon, and their commissions usually of limited scope. Under Henry II they became more frequent, and later attained a certain regularity of schedule. During the thirteenth and first half of the fourteenth century, delegates or justices on general eyre made periodical visits under commissions granting them the widest powers. They stood in the place of the king himself. They constituted a most effective engine of government with possibilities for dire oppression or for genial beneficence. If Mr. Bolland is to be trusted, their chief object was to fill the royal coffers. To them all local officials, assemblies and tribunals must give letter-perfect accounts of their

5 See Bolland, The General Eyre; 1 Eyre of Kent, Selden Society, Introduction; Select Bills in Eyre, Selden Society, Introduction.

stewardship. There was a most meticulous searching of records, a most minute examination into happenings which affected the king. Every imperfection had to be paid for in money. And there were trials of cases, civil and criminal. All other courts were suspended in the county where these justices were sitting. For the time and place all justice was royal justice. And since they stood in the place of the king "to do right to poor and to rich," they were not bound to follow the usual procedure of royal or local courts, and might entertain the most informally framed petitions and requests for redress of grievances. Indeed their jurisdiction was unlimited. But their judicial duties seem to have been of comparatively minor importance. They were hated and feared by the people, and they ceased to function before the latter half of the fourteenth century.

During this same period other delegates of the Curia Regis, other itinerant justices, were despatched through the land with more limited commissions. Some were charged with duties chiefly judicial,—to try prisoners in specified gaols, or to inquire as to crimes committed in certain counties and to hear and determine the accusations, or to try the new possessory actions. The justices of assize—as those assigned to try the possessory actions were called—were sometimes judges of one of the central courts, sometimes king's serjeants. By a series of enactments beginning in 1272, their powers were broadened until they attained a position of prime importance in the judicial system. Royal judges were also regularly sent to the counties to hear cases begun in the central courts. In this manner the royal courts and their more enlightened procedure were made accessible to the people, and the intolerable hardship which would otherwise have been caused by centralizing the administration of justice was avoided.

Court of Common Pleas. Although the justices on general eyre, in their role as royal extortioners, were an abomination to the people, the itinerant justices with merely judicial functions so demonstrated the value and need of their services as to cause a demand for the creation of what Professor George Burton Adams has called "a permanent itinerant justice court."[6]

[6] See Adams, Origin of English Courts of Common Law, 30 Yale Law Journal 798.

This was established in 1178. It was to sit permanently at Westminster and to be constantly available for hearing "*clamores*" of the realm, the actions between subject and subject. Questions of great difficulty it was to refer to the king for decision by him and the wiser men of the kingdom, the Curia Regis. Thus it was not a committee of the Curia Regis but a creature of it. Such was the origin of the Common Bench or Court of Common Pleas. It had exclusive jurisdiction of real actions and a theoretical monopoly of the older personal actions, debt, detinue, covenant and account. It had power to supervise the doings and correct the errors of the local courts. It acquired authority to try the newer personal actions, trespass and its offshoots. In the seventeenth century it was empowered to issue writs of habeas corpus and prohibition. From the begininng of the fourteenth century it was crowded with business, and until the sixteenth century maintained a position of predominance as a court of first instance. Thereafter it had sharp competition from the courts of King's Bench and Exchequer.

Court of King's Bench. During the first half of the thirteenth century, unless Bracton is mistaken, the only royal courts were the Common Bench, the Itinerant Justices and the Curia Regis or King in Council. The Council had always exercised original jurisdiction over great men and great causes and the power to supervise other courts and correct their errors. Its composition for the performance of this function varied. At times it consisted of the king and a large assembly of the mighty; more often of the king and a small number of justices. Increase of judicial business made the larger assembly a practical impossibility except on rare occasions, so that gradually the smaller tribunal began to take on the appearance of a court separate and apart from the other. During the reign of Henry III the division was becoming noticeable, for in 1268 a chief justice was appointed for causes to be held *coram rege;* in the reign of Edward I, the separation was growing more marked; and during the fourteenth century it became complete. In the earlier career of the court the presence of the king at its sessions was a reality, but obviously its work could not stop when for long periods the king was unavailable, as during the minority of Henry III. Consequently though its hearings were always said to be in the

presence of the king, that presence had become more or less of a fiction by the fifteenth century, if not before.

Its jurisdiction extended to civil and criminal causes. Few criminal actions were begun before it, but many originating in inferior courts were transferred to it because local conditions made a fair trial impossible or because perplexing problems of law were involved. It also had power to review the judgments of inferior courts in criminal cases, though no adequate appellate jurisdiction in criminal causes existed in England until 1907.

Its civil jurisdiction as a court of first instance did not include real actions or those personal actions where there was no allegation of force, or of injury to the person. Wrongs done *vi et armis* were within its province. Trespass and the actions which grew out of it, it could properly entertain. But it was not content with these, and by a clever fiction it extended its powers and increased its revenue. The prison of the court was in charge of the Marshal of the Marshalsea of the King. Any prisoner in the keeping of the Marshal was under the jurisdiction of the court. Consequently, if a defendant in an action of trespass were taken into the custody of the Marshal, any form of personal action might be brought against him in the King's Bench. If plaintiff desired to sue defendant in debt in the King's Bench, he might first bring action of trespass and have defendant arrested and confined by the Marshal; then he could begin his action of debt and let the charge of trespass drop. Of course the complaint of trespass was false; its sole purpose was to bring defendant and the true cause of action within the jurisdiction of the court. Since the court was anxious to have this object accomplished, it furnished plaintiff all the requisite procedural aid. Plaintiff began by filing as a complaint in trespass a so-called bill of Middlesex. Upon the filing of the bill the sheriff of Middlesex was ordered to bring defendant before the court to answer the complaint in trespass. If defendant could not be found in Middlesex, plaintiff was given a writ of latitat to the sheriff of a neighboring county, which advised him that defendant was hiding and flitting about in his county and ordered the sheriff to apprehend him. If defendant was caught and delivered to the Marshal, then plaintiff might come on with his true complaint. If defendant gave bail and was released, he was

still constructively in the custody of the Marshal, and the true action could go on. As the result of rulings that recitals in the court records of appearance and bail by defendant were conclusive evidence of his being in the custody of the Marshal, parts of the proceeding became fictitious. In some cases the plaintiff was permitted to enter appearance for defendant and give sureties for his further appearance at the trial. It is hardly necessary to say that these sureties were the same distinguished gentlemen who acted as plaintiff's pledges to prosecute the charge of trespass, those ubiquitous legal handymen, John Doe and Richard Roe. In this fashion did the King's Bench divert to itself much of the business properly within the exclusive jurisdiction of the Common Pleas, to its own profit and to the great detriment of the older tribunal. In vain did the Common Pleas judges and their supporters in Parliament protest. The only statute which they were able to secure was easily circumvented by the lawyers and judges of the King's Bench. And it was not until the Common Pleas, under Chief Justice North after the Restoration, modified its procedure by a fiction similar to the bill of Middlesex that it retrieved a fair share of the litigation of the kingdom. The bill of Middlesex and the fictitious processes of the Common Pleas and Exchequer were abolished by the Uniformity of Process Act in 1832, but the jurisdiction of each, as it then existed, was not thereby changed.

As an appellate court in civil cases the King's Bench had almost exclusive jurisdiction in error during the thirteenth and part of the fourteenth century. Although a higher court later emerged, the King's Bench retained its power to correct the errors of all other courts except the Exchequer. In the exercise of its supervisory power over judicial and other officials it had authority to issue writs of Habeas Corpus, Certiorari, Prohibition and Mandamus.

Court of Exchequer. As early as the middle of the reign of Henry I the Curia Regis found it necessary to establish a committee on revenue, a sort of department of finance. Of this all its important officials were made members. The department was composed of two sections. The lower division, or Exchequer of receipt, took in and tested the money; the upper division audited

and settled accounts and determined legal controversies concerning them. From this upper division was gradually evolved the Court of Exchequer. It is impossible to say just when it became a separate tribunal: for a long time its connection with the Curia was very close. Even in the early fourteenth century it is extremely difficult to distinguish its sessions from sessions of the Council.

As a subdivision of the Council its jurisdiction was inherently as broad as that of the Council. Doubtless it was created primarily to handle revenues. And in the latter part of the thirteenth century there was an earnest effort by ordinance and statute to limit its activities to that field. However, it never completely recognized this limitation, although from the early 1300s to the middle of the sixteenth century its business consisted almost exclusively of revenue cases. But thereafter it claimed and exercised jurisdiction in actions at common law and suits in equity. Of course, it did not purport to disregard statute and ordinance. On the contrary, it gave them the most punctilious lip-service. Yet it avoided their effect by a simple artifice. There was no question that it had jurisdiction over the collection of revenue. If A were debtor to the crown, and B were debtor to A, the crown might collect from B or from B's debtor C, and so on to the end of the alphabet. Now if A could not collect from B, he was by so much the less able to account to the king; and to that extent A's claim against B directly concerned the royal revenue. It therefore fell squarely within the jurisdiction of the Court of Exchequer. Consequently A might get a *quo minus* writ, which would in the name of the king command the sheriff to bring B before the barons of the Exchequer to answer A's complaint that B owed him such a sum, whereby A "is the less (*quo minus*) able to satisfy us the debts which he owes us at our said exchequer, as he saith he can reasonably show that the same he ought to render." And likewise with other personal claims. The actual indebtedness of A to the crown was not material; only the allegation was required. By the same device the Exchequer entertained suits in equity. In 1832 the fictitious process was abolished, and in 1842 the Exchequer Court was deprived of equitable jurisdiction by statute.

Court of Chancery.[7] It will be remembered that immediately after the Norman Conquest justice for the ordinary man in the usual case was administered in the local courts. The notion that royal tribunals should be made available for all men and all causes was not yet conceived. But the idea that the King and his Curia were the great reservoir of justice for the entire kingdom was implicit in the assumption that they could and would provide a remedy in the exceptional case, where for one reason or another the local courts could not function effectively. As time went on, royal justice became more and more common. The cases where the Curia, or its delegates, or the courts which evolved from it exercised jurisdiction, grew in number and variety.

The device by which actions were normally brought into the royal tribunals was a royal mandate or writ. By this writ issued in the name of the king the defendant was summoned before his justices, and they were authorized to hear and determine the controversy. Obviously neither the sovereign personally nor the Curia in assembly could handle the numerous applications for such writs. This business was committed to the Chancery, a department of government with the Chancellor at its head. And just as clearly, the Chancellor had to delegate the routine work to a body of subordinates. Set forms to fit the usual case were developed, and ordinarily the Chancellor's clerks had only to adapt them to the needs of the particular plaintiff. If no suitable form could be found, the Chancellor, in the first half of Henry III's reign, did not hesitate to manufacture a new one; and for a time it looked as if no litigant, able to pay the requisite fee, need be turned away from the courts of the crown. But in the latter half of the thirteenth century the Chancellor's power to frame new writs was greatly limited. Consequently, unless there was a formed writ which exactly or nearly fitted the applicant's case, he must generally take such inadequate relief as the inferior local courts offered, or go remediless.

But the source of royal justice was not dried up. The King and his Council could still grant relief in extraordinary cases. This was never denied. The general recognition of this power

[7] See Adams, Origin of English Equity, 16 Columbia Law Review 87; Select Cases in Chancery, Selden Society, Introduction.

strikingly appears in the petitions made to justices on general eyre in the last years of the thirteenth century and the first part of the fourteenth. These justices were regarded as the direct representatives of the king. Litigants who could not afford to follow the regular procedure or whose adversaries were able to block the usual paths to relief, came before them in the most unconventional manner,—came with petitions poorly written, badly phrased, wrongly spelled. Alice,[8] after telling how Thomas had wronged her, said: "Alice can get no justice at all, seeing that she is poor and this Thomas is rich. Think of me, sir, for God's sake and for the Queen's soul's sake." In another prayer, she entreated: "For God's sake, Sir Justices, think of me, for I have none to help me save God and you." One suppliant [9] related how he had been so badly treated by Thomas, the forester of Newcastle, that "for no treasure in the world would he have suffered this damage and shame put upon him" and prayed remedy "for the love of Jesus Christ and the Queen's soul's sake. And besides this, that same Thomas is a maintainer of pleas so that many have been oppressed by him and through his abetment; and if the sheriff have to come to inquire of the peace that same Thomas conveneth his court and telleth the people what folk the inquest must indict, for they dare not go against his wishes." John Feyrewyn [10] addressed a justice thus: "Dear Sir, I cry mercy of you who are put in the place of our lord the king to do right to poor and to rich." After describing how his adversary had defrauded him, and praying a return of his money, he promised: "As soon, my lord, as I get my money, I will go to the Holy Land, and there I will pray for the King of England and for you especially, Sir John of Berewick, for I tell you that I have not a halfpenny to spend on a pleader; and so for this, dear Sir, be gracious unto me that I may get my money back." And the records show that the justices entertained these petitions and granted appropriate relief.

If mere delegates of the King and Council could thus disregard the restrictions of the formulary system, certainly the King and Council, acting directly, were beyond its limitations. Indeed, the very provisions which curbed the Chancellor expressly

8 Select Bills in Eyre (Shropshire Eyre, 1292), 2.
9 *Id.* (Staffordshire Eyre, 1293), 52.
10 *Id.* (Shropshire Eyre, 1292), 6.

affirmed the power of the King and Council to grant extraordinary relief and to direct the manufacture of new writs. And the litigant who was remediless by ordinary process, was not slow to seek this source of redress. He petitioned the King or the King in Council, or the King in Parliament, because his case was unusual, or his opponent was too powerful, or the offense too heinous, or the subject matter too difficult, or the usual remedies inadequate. In handling such petitions, naturally the Chancellor's assistance and advice must be sought. His office, better than any other, must know what cases the ordinary courts could and would generally entertain. He more than any other official would be likely to have a sound judgment as to the proper remedy. And when the applications became too numerous for the King or the Council or Parliament to manage, he was the member of the official family best fitted to take them over, and his office the best equipped to care for them. And so in the reign of Edward III an ordinance directed all matters of grace to be referred to the Chancellor. Consequently suppliants began to address their prayers to the Chancellor instead of to the King or the Council. Like the poor petitioners to the justices in eyre, they prayed relief "for God and in way of charity." Like them they gave reasons why the ordinary courts could not furnish adequate remedy. Henry Glanville [11] declared he could not get justice against one Champernoun "as the Common Law demands, because of his great maintenance." David Usque [12] asked the Chancellor to require his adversary to come and make answer, "having consideration that the said William is so rich and so strong in friends in the country where he dwelleth, that the said David will never recover from him at common law, if he have not aid from your most gracious lordship."

Frequently the Chancellor had but to direct the applicant to the proper court. But at times, though a common law tribunal was competent to handle the subject-matter, the parties were too powerful. Again, in a case of unusual content the Chancellor might issue a new and special writ to an existing court, but the judges on motion were too likely to quash it as unwarranted. Thus it fell out that the Chancellor or his deputies often had to

11 Select Cases in Chancery (1393), 11.
12 *Id.* (1397-1399), 34, 35.

hear and determine cases. So in the fourteenth and fifteenth centuries the Chancellor was performing the functions of a court, and by the end of the 1400s he can be said to be the head of an independent court separate and apart from the Council.

The procedure which was developed in Chancery differed materially from that of the Common Law Courts. The summons to the defendant directed him to appear under penalty of forfeiting a specified sum of money, and was called a subpoena. He was not advised of the details of the complaint against him, but was commanded to come in and answer before the Chancellor the complaints made by the plaintiff. When he appeared, he had to respond under oath to every charge made in plaintiff's bill. The Chancellor decided all questions both of law and fact. His court did not consider itself bound by precedent. It administered the "rules of equity and good conscience." Obviously these must have been rather elastic and indefinite; and they aroused the disapproval and contempt of the common lawyers. Selden called chancery "a rougish thing" because it had no measure more constant than the length of the Chancellor's foot. But gradually these rules lost their elasticity; decisions of the court were preserved and recorded, and they finally came to have the same effect in their proper sphere as the common law decisions in courts of common law.

As our cases of Henry and David show, the Chancellor in the fourteenth century probably did not hesitate to take jurisdiction of a cause merely because its subject-matter fell within the cognizance of the courts of common law. And he doubtless conceived of himself as applying the same rules which the common law would enforce in the same cases. His less costly and more effective procedure attracted litigants. But this fact aroused the opposition of the common law judges and lawyers and of Parliament, with the result that he was deprived of jurisdiction generally in those cases in which the common law courts could furnish a reasonably satisfactory remedy. This is no place to tell the story of the decline of Chancery in the seventeenth and eighteenth centuries from the efficient court of the poor litigant to the scandalous tribunal of Jarndyce v. Jarndyce, or of its reorganization in the nineteenth century. Suffice it to say that before the Judicature Acts of 1873 and 1875 the following had occurred: (a) The court had acquired additional business as a

result of the abolition of the jurisdiction in equity of the Court of Exchequer. (b) It had lost jurisdiction in bankruptcy, which had been vested in a new court, the London Court of Bankruptcy. (c) Its trial judges were the Master of the Rolls and three Vice-Chancellors. (d) A court of intermediate appeal had been established consisting of two Lords Justices in Chancery and the Lord Chancellor, assisted by the Master of the Rolls, the Vice-Chancellors or any of the judges. This court also had jurisdiction of appeals in bankruptcy. (e) Final appeal lay to the House of Lords.

Court of Admiralty.[13] In the early 1300s local courts of seaport towns were the regular tribunals for maritime causes. But they were not efficient. The King and Council were persistently petitioned for relief, and great difficulty was experienced in adjusting with foreign governments and their subjects claims by and against English subjects for piracy. About the middle of the century jurisdiction over such matters was conferred upon the several admirals and their courts. Early in the next century it was vested in the Lord High Admiral and his court. In the second half of the 1500s this tribunal increased tremendously in importance. It extended its power to cover all sorts of transactions involving commerce and shipping, all contracts made outside the realm, all torts committed on tidal waters, wreck and stranded property, and spoil or prize. This expanding jurisdiction aroused the antagonism of the common law courts, and under the leadership of Coke they succeeded in the seventeenth century in reducing its scope in civil cases to an unimportant minimum. By legislation in the nineteenth century, the court was again clothed with extensive powers over maritime causes. In its earlier history appeals from its judgments lay to the King in Chancery. Since 1833 they have lain to the Judicial Committee of the Privy Council.

Other Courts of Special Jurisdiction. It would be unprofitable to describe in detail the various courts of fairs and markets which enforced the usages and customs of merchants in non-maritime cases. Their functions were later absorbed by the royal

13 See Select Pleas in the Court of Admiralty, Selden Society, Introduction.

courts of common law. No separate national tribunals were established to administer the non-maritime law merchant.[14]

Likewise it seems unnecessary to treat of the long struggle between the royal courts and the ecclesiastical courts. In the twelfth and thirteenth centuries the Roman Catholic Church had a magnificent system of courts with the Roman Curia as the tribunal of last resort. They asserted jurisdiction over all causes, civil and criminal, in which an ecclesiastic was the defendant or the accused; and over certain other litigation on the ground that its subject-matter had to do with church economy or with the enforcement of moral or spiritual duties. On this basis they entertained cases concerning marriage, divorce, legitimacy, wills, and promises made on oath or pledge of faith. Ultimately they were shorn of practically all judicial power and were confined to the regulation of the polity and internal discipline of the church. In 1857 their jurisdiction over divorce and matrimonial causes was given to the Divorce Court and that over testamentary matters to the Court of Probate.

Court of Exchequer Chamber. When the Court of Exchequer definitely emerged as a separate tribunal trying common law causes, the Court of King's Bench claimed jurisdiction to correct its errors. But it was unable to establish such a supervisory power; and rightly so, for two reasons. The Exchequer was not a common law court; and the Exchequer in origin and evolution was co-ordinate with the King's Bench. It was not a creature of the Curia Regis as was the Court of Common Pleas, but was as truly a branch of the Council as the King's Bench. To provide a court for the correction of errors of the Exchequer the Statute of 31 Edward III (1357-8) established the Court of Exchequer Chamber composed of the Chancellor of the Exchequer and the Treasurer assisted by "the justices and other sage persons."

A second Court of Exchequer Chamber was created in 1585 for the correction of errors of the Court of King's Bench. The statute of 27 Elizabeth, after reciting that errors in the King's Bench could be corrected only by Parliament and that Parlia-

14 See Select Cases on the Law Merchant, Selden Society, Vol. I, Introduction.

ment met but infrequently, set up a new court with power to correct the errors of the King's Bench in certain cases originating therein. It had no jurisdiction over decisions in the King's Bench on error from the Common Pleas. Its judges were the judges of the Common Pleas and the Barons of the Exchequer. Any six of them might render judgment. From such judgment a further appeal lay to Parliament. In 1830 these two courts were consolidated. Jurisdiction in error was taken from the Court of King's Bench, and this new Court of Exchequer Chamber was given appellate jurisdiction over the Courts of Common Pleas, King's Bench and Exchequer. Its judges in any case consisted of the judges of the two courts other than that from which the appeal was taken. It was abolished by the Judicature Acts.

House of Lords. During the Norman period all the powers of government were vested in the King and the Curia Regis. The volume and complexity of the business of the central government soon required delegation of powers and duties and differentiation of function. The necessity of administering justice to an ever increasing number of complainants caused the creation and development of various courts. These were, and for a long time in theory remained, mere agencies or creatures of the King in Council. The King in his Council or the King in his Council in Parliament continued to be the wellspring of all royal justice. Here lay the power of original jurisdiction over any cause, though the requirements of practical administration might limit its exercise to exceptional cases; here lay the power of final correction of errors of all other courts. In the course of the thirteenth century the King and his Curia had to share the powers of government with the representatives of the counties and boroughs. These in 1333 became the House of Commons. The great magnates, lay and ecclesiastical, of the Curia Regis at the same time became the House of Lords. Since the Commons were a part of Parliament, and since they doubtless had a share in legislation, did they become a part of the King's Council in Parliament for judicial purposes? Though there was no disposition in the fourteenth and fifteenth centuries to draw any clear-cut distinction between judicial and legislative functions, it seems

reasonably certain that the Commons made no serious claim of right to share in the judicial work of the Council. That they possessed no such authority was the opinion of the judges in 1485, and this view prevailed in practice. The Council of the King in Parliament was a session of the House of Lords.

To what extent did the Lords succeed to the judicial privileges and duties of the old Curia? In civil cases they asserted original jurisdiction over such causes as they desired to hear, and could cite early precedents to support them. But in the seventeenth century the Commons so strenuously opposed this claim that the Lords were forced to relinquish it. The power of the old Curia to remove to itself actions pending in the courts, the Lords allowed to die from disuse. But they did retain and exercise the authority to review and correct the errors of the King's Bench, the Exchequer Chamber and the common law side of Chancery; and in the latter part of the seventeenth century they made good their claim of authority to hear appeals from the equity side of Chancery. The House of Lords was therefore the appellate court of last resort in civil cases in law and equity. In criminal cases it lost by the middle of the seventeenth century nearly all original jurisdiction. It did, however, establish and maintain its right to try peers accused of felony or treason. In such trials it acts as a jury with the Lord High Steward presiding as judge. And at present under the Criminal Appeal Act of 1907 it may hear appeals from judgments of the Court of Criminal Appeal upon certificate from the Attorney-General.

The Privy Council. As the courts of King's Bench, Exchequer and Chancery were slowly emerging and becoming distinguishable from the Curia Regis; as the great magnates were separating themselves into the House of Lords, that group of royal officials and professional advisers who stood closest to the sovereign and were prone to magnify his office, were becoming segregated as a select or privy council. As such it tended to become an executive body, but it retained rather indefinite and extensive judicial powers. Parliament had little confidence in it. The common law courts denied its right to review their judgments. Cases involving freehold, treason or felony were removed from its jurisdiction. In the half-century following 1435,

while Chancery was growing in strength, the Council was on the decline, but during the Tudor period, it attained a masterful position in the government. At the opening of the sixteenth century the Council was separating into two divisions, one following the king and attending chiefly to executive and administrative duties, the other remaining at Westminster and taking care principally of judicial work. The latter met in the Star Chamber. Its official title became "The Lords of the Council sitting in the Star Chamber." It later assumed almost the appearance of a court distinct from the Council, though it always remained in fact and in legal theory a division of the Council. Under the Tudors it exerted a most beneficial influence: it furnished expeditious, inexpensive and effective justice in civil and criminal cases. But under the Stuarts, on account of its baneful political activities it became anathema. It was abolished in 1641 by an act which struck down most of the judicial power of the Privy Council. Indeed almost the only jurisdiction left to it was over appeals from the foreign dominions of the crown. Colonial expansion soon made this a power of primary significance. From the beginning it was administered by a committee of the Council. Thus it has come about that the Judicial Committee of the Privy Council is a most important court of last resort. By statute it was given final appellate jurisdiction also in Admiralty and Prize cases.

Reorganization and Consolidation.[15] Thus, just prior to the Judicature Act of 1873, the English system comprised eight principal courts of original jurisdiction besides the Courts of Assize, Gaol Delivery and Oyer and Terminer. These were the King's Bench, Common Pleas, Exchequer, Chancery, London Court of Bankruptcy, Admiralty, Probate, and Divorce. And four courts with appellate jurisdiction, namely, Exchequer Chamber, Chancery Appeals, House of Lords, and Judicial Committee of the Privy Council. From King's Bench, Common Pleas, and Exchequer writ of error lay to the Exchequer Chamber and thence to the House of Lords; from Chancery and the London Court of Bankruptcy there was an appeal to Chancery Appeals and thence to the House of Lords; from Probate and

15 See Kales, The English Judicature Acts, 4 Journal of American Judicature Society, 133.

Divorce a direct appeal to the House of Lords, and from Admiralty to the Judicial Committee of the Privy Council. By the Judicature Act and its amendments all these courts except the House of Lords and Privy Council were consolidated and erected into the Supreme Court of Judicature. This was divided into the High Court of Justice and the Court of Appeal. To the former was given all original jurisdiction formerly possessed by the consolidated tribunals, and to the latter all the jurisdiction theretofore exercised by Chancery Appeals and the Exchequer Chamber, that exercised by the Judicial Committee of the Privy Council in lunacy cases and in admiralty cases other than Prize cases, and the power to set aside verdicts and judgments of the High Court of Justice and grant new trials therein. From the Court of Appeal, an appeal lies to the House of Lords. "For the more convenient dispatch of business in the said High Court of Justice (but not so as to prevent any judge from sitting whenever required in any divisional court or for any judge of a different division from his own)," the court was divided into five divisions: (1) Chancery, (2) King's Bench, (3) Common Pleas, (4) Exchequer, (5) Probate, Divorce and Admiralty. In 1881 the King's Bench, Common Pleas and Exchequer were merged into one division as the King's Bench, so that the High Court now has but three divisions.

As heretofore pointed out there was no satisfactory method of reviewing criminal cases in England until 1907. It was an ancient practice for the judges when in doubt of the accused's guilt under the law to take a special verdict from the jury, or to reserve a doubtful point for the consideration of the judges. This latter practice was given statutory sanction in 1848 by the creation of the Court of Crown Cases Reserved. If the reserved point was decided in favor of the convicted prisoner, he was pardoned. The reservation was entirely within the discretion of the trial judge. The Criminal Appeal Act of 1907 established a Court of Criminal Appeal with power to hear appeals upon questions of law and fact and upon the propriety of the sentence, and to affirm or quash convictions, and to affirm or modify sentences. Appeal lies from its decision to the House of Lords only upon a certificate by the Attorney-General that a point of law is involved "of exceptional public importance and that it is

desirable in the public interest that a further appeal should be brought."

Military Tribunals. For the administration of laws applicable to members of the military and naval establishments military and naval courts have functioned in England from ancient times. In time of war they have jurisdiction also over certain classes of civilians. In territory under military government or martial law military commissions and provost courts frequently have complete control of the administration of justice. Further description of them is beyond the purpose of this chapter.

COURTS OF THE UNITED STATES [16]

Federal Judicial Power. The judicial power of the government of the United States is granted in article three of the Constitution, limited by the eleventh amendment:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects."
>
> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Federal Courts. Although there had been in colonial America the same general lack of discrimination between executive, legislative and judicial powers as in contemporary England, the

16 See Rose's Federal Jurisdiction and Procedure (3 ed.), *passim.*

Constitution attempted to draw sharp lines between them and to place each in a separate department. The judicial power it vested "in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." The existing system of judicial tribunals of the United States consists chiefly of the District Courts, Court of Claims, Court of Custom Appeals, and Supreme Court.

The District Courts. The United States is by Act of Congress divided into judicial districts. Each state constitutes at least one district, and no district includes territory in more than one state. For each district is created a court of general original jurisdiction, called the United States District Court. Chapter two of the Judicial Code enumerates the cases over which the District Courts have jurisdiction. It comprehends most, but not all, of the matter specified in article three of the Constitution. Of some of these cases the state courts have concurrent jurisdiction, but of the following the district courts are given exclusive original jurisdiction by section 256 of the Judicial Code:

"First. Of all crimes and offenses cognizable under the authority of the United States.

"Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

"Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

"Fourth. Of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

"Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy.

"Seventh. Of all controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

"Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls."

Removal of Causes. Provision is also made for removal to the District Courts from the courts of the separate states of certain causes which might have been originally brought in such District Courts. They fall into eight groups. (But no case arising under the Federal Employers Liability Act is removable even though it otherwise falls within one of these groups): (1) Cases involving a federal question.—Causes arising under the Constitution, laws or treaties of the United States where the matter in controversy exceeds $3,000 exclusive of interest and costs are removable upon petition of defendant. (2) Cases with parties of diverse citizenship.—Other civil causes where the matter in controversy exceeds $3,000 exclusive of interest and costs and all defendants are non-residents of the state and each is of different citizenship from that of any plaintiff are removable upon petition of defendant or defendants. (3) Separable federal controversy.—Where the District Court might have taken original jurisdiction of a cause as belonging to either of the foregoing groups, and there is in such cause a separable controversy wholly between citizens of different states, the cause may be removed on petition of the defendant or defendants interested in the separable controversy. (4) Cases affected by prejudice or local influence.—Where a cause is brought in a state court by a citizen thereof against a nonresident defendant, the latter may have it removed upon a showing that he cannot have a fair trial on account of local prejudice or local influence. (5) Cases of claims under land grants from different states.—Where in any cause citizens of the same state are claiming lands under grants from different states, and the matter in controversy exceeds $3,000 exclusive of interest and costs, the cause may be removed on petition of either party. (6) Cases against civil officers.—Any cause by an alien against a non-resident civil officer of the United States is removable on petition of defendant. (7) Cases involving denial of civil rights.—A defendant in any cause who is denied any right secured to him by any law providing for equal rights of citizens of the United States may have the cause removed. (8) Cases against revenue officers and Congressional officers.—Any suit or prosecution against a revenue officer of the United States or a Congressional officer on account of any act done by virtue or color of his office may be removed on petition of defendant.

Court of Claims. This court, established in 1855, is continued in existence by the Judicial Code. Its jurisdiction is fixed by section 145 thereof. In brief it has authority to hear and determine "all claims (except for pensions and 'Civil War claims') founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the government of the United States, or for damages, liquidated or not liquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable:" likewise all set-offs, counterclaims, claims and demands of the United States against any claimant in said court. It also may entertain and decide the "claim of any paymaster, quartermaster, commissary of subsistence or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of loss by capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible." Appeal is allowed in certain cases to the United States Supreme Court.

Court of Customs Appeals. This court was established in 1909. It has "exclusive appellate jurisdiction to review by appeal . . . final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases." But provision is made for review upon *certiorari* by the United States Supreme Court in certain cases of importance.

Circuit Court of Appeals.[17] In 1891, in order to relieve the Supreme Court from an intolerable amount of labor, Congress divided the federal judicial districts into nine groups or circuits,

[17] See Mr. Chief Justice Taft, Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale Law Journal 1; Bunn, The New Appellate Jurisdiction in Federal Courts, 9 Minnesota Law Review 309.

and established a Circuit Court of Appeals for each circuit. Each of these courts has no original jurisdiction but is strictly an appellate tribunal. All final decrees and judgments of the District Courts, which are reviewable, must be reviewed, if at all, by the proper Circuit Court of Appeals, except such as are specifically authorized to be taken directly to the United States Supreme Court. The number of such exceptional cases was slightly reduced from time to time until the Act of February 13, 1925, cut it down almost to a minimum. Certain non-final orders of the District Courts are also reviewable by the Circuit Courts of Appeals. The judgments of these courts can be re-examined by the Supreme Court only upon certiorari, which means only in its sound discretion, except in the single case where a state statute has been held invalid as violating the Constitution, treaties or statutes of the United States. In such event appeal or writ of error lies as a matter of right.

Supreme Court. The Supreme Court has original jurisdiction in civil actions where a state is a party, and exclusive jurisdiction of such actions against ambassadors or other public ministers, and non-exclusive jurisdiction of all suits by ambassadors or other public ministers and suits in which a consul or vice-consul is a party. It has appellate jurisdiction to review the judgments of the nine Circuit Courts of Appeal and the Court of Appeals of the District of Columbia, some decrees of the District Courts of the United States, the judgments of the Court of Claims, certain final judgments and decrees of the Supreme Court of the Philippines, and of the Court of Customs Appeals, and final judgments and decrees involving federal questions of the courts of last resort of the several states. In most of these instances review is in the discretion of the Supreme Court by writ of certiorari; in some appeal or writ of error lies as a matter of right.

Military Tribunals.[18] Military tribunals are of three sorts, military commissions, provost courts and courts-martial. The

[18] For courts-martial of the army, see Manual for Courts-Martial, published as War Department Document No. 1053 by Government Printing Office, 1920; for courts-martial of the navy, see Naval Courts and Boards, published by Government Printing Office, 1917, and Laws Relating to the Navy, Annotated, compiled by George Melling, published by Government Printing Office, 1922.

first two function only in territory under military government or martial law, and derive their powers from the so-called laws of war. Courts-martial have jurisdiction over the members of the land and naval forces of the United States, and in time of war over certain civilians. The chief source of their authority lies in Acts of Congress.

COURTS OF THE SEVERAL STATES

Generally. In each state by constitutional provision and legislative enactment there is established a system of judicial tribunals, which includes various courts of original jurisdiction and one or more of appellate jurisdiction. Usually there is one court of unlimited original jurisdiction which has power to entertain any action regardless of the amount involved or the nature of the relief demanded, though ordinarily it does not have authority over the probate of wills or administration of estates of decedents. And there are generally several inferior courts with jurisdiction limited as to subject-matter, amount in controversy or relief sought. These are commonly called by some such name as Town Courts, Municipal Courts, City Courts, Police Courts, Justices of the Peace. In many states there is but one appellate tribunal, a court of last resort; but in some an intermediate tribunal is provided with powers somewhat similar to those of the Circuit Courts of Appeal of the United States. It would be impracticable to attempt to give an account of the courts in each of the states. A brief description of those in New York must suffice.

New York Courts of Original Jurisdiction.[19] *The Supreme Court of New York* has original jurisdiction in all actions in law and equity, no matter what the amount involved. The state is divided into nine districts and a division of the court sits in each district. The Supreme Court in each district sits in so-called Terms, called Trial Terms and Special Terms. In the former, roughly speaking, common law actions are tried; in the latter equity cases, issues of law, various interlocutory motions and special proceedings are heard.

[19] For the Courts of New York generally see New York Judiciary Law: Court of Appeals, Art. 3; Appellate Division, Art. 4; Supreme Court, Art. 5; County Court, Art. 6.

For each county except New York County, a *County Court* has been created with jurisdiction over actions affecting real property within the county, actions affecting the care of the person or property of incompetents within the county, and other actions against persons resident within the county wherein the complaint demands a money judgment only for not over $2,000 or the recovery of chattels the value of which is not more than $1,000.

The City Court of New York has power to entertain any action at law for money damages if the summons is served within the City of New York as it existed prior to January 1, 1898, or the defendant voluntarily appears; but it cannot render a judgment for plaintiff for more than $2,000 exclusive of interest and costs except in a few cases. It has no jurisdiction in equity except to foreclose mechanics' liens and certain liens on chattels.

The Municipal Court of the City of New York is granted jurisdiction in certain specified actions where the amount involved exclusive of interest and costs does not exceed $1,000. It is divided into districts, and actions must be brought in the district wherein one of the plaintiffs or one of the defendants resides. The procedure is simplified.

Justices' Courts of strictly limited power exist throughout the state. Cases wherein an amount exceeding $200 is involved are beyond their jurisdiction.

The Surrogate's Court exercises jurisdiction over the probate of wills, the administration of decedents' estates and the person and property of infants. There is a surrogate of each county in the state.

New York Courts of Appellate Jurisdiction. *The Supreme Court* has appellate jurisdiction as well as original jurisdiction. An Appellate Division has been established for each one of the four judicial departments into which the state is divided. It is a court of last resort in some cases, and an intermediate appellate tribunal in others. To it appeals lie from final and interlocutory judgments and from certain orders of the Supreme Court, and from certain judgments and orders of other courts. In the counties of King and New York, the Appellate Division has a section or branch called the Appellate Term, which handles appeals from the City Court and the Municipal Court of New York City.

From the Appellate Term the Appellate Division may entertain an appeal.

The Court of Appeals is the court of last resort. A party may appeal as a matter of right from a final judgment or a final order in a special proceeding of the Appellate Division where a constitutional question is directly involved, or where the Appellate Division has reversed the lower court or where there is a dissent by one or more of the judges of the Appellate Division. In certain other cases an appeal is allowed by permission of the Appellate Division or of the Court of Appeals.

CHAPTER II

NATURE AND SOURCES OF LAW

Legislation. If the law consists of the rules administered by the courts, it is pertinent to inquire whence the courts derive them. One of the sources is legislation. Theoretically, legislation may be enacted either directly by the members of the community or through their representatives; practically it is and always has been enacted by the latter, for universal participation in the framing or approval of statutes is impossible. Those who have and exercise the privilege of constructing a form of government for any jurisdiction may provide for a representative body with unlimited power of legislation, like the English Parliament, or for a body with strictly limited authority, like the Congress of the United States or the legislatures of all our states.[1] The legislative sources to which an American court may resort are (1) the Constitution of the United States; (2) Acts of Congress and Treaties made within the authority of the Constitution; (3) the Constitution of any state in so far as not repugnant to the United States Constitution, the Acts of Congress or Treaties; (4) the enactments of the legislature of any state not repugnant to the Constitution of the United States, the Acts of Congress, Treaties, or the Constitution of that state; (5) the enactments of any subordinate legislative body made within the scope of the powers duly delegated to it.

Common Law. When a court, other than a court of admiralty or of equity or a military tribunal, is confronted with a problem which cannot be solved by reference to pertinent legislation, it is ordinarily said that it must make its decision according to the common law. The common law of England is usually defined as consisting of those principles, maxims, usages, and

[1] Of course, the limitations upon Congress are different from those upon the state legislatures, for Congress has no powers not granted to it by the United States Constitution, while the state constitutions are not grants of power but documents of restriction.

rules of action which are based upon immemorial custom and are enforced by its courts. Some of them may have originated in unrecorded, lost or destroyed legislative acts. The common law of any American jurisdiction is generally considered as made up of the English common law, with such modifications as are required by the different circumstances and conditions therein existing and certain English statutes in force prior to the Revolution.[2] It is to be noted that the common law is not a body of rules universally and automatically applicable like the law of gravitation, but owes its power and its very existence to an organized government. As Mr. Justice Holmes has put it: "The

[2] "A great part of the municipal law of Massachusetts, both civil and criminal, is an unwritten and traditionary law. It has been common to denominate this 'the common law of England,' because it is no doubt true that a large portion of it has been derived from the laws of England, either the common law of England, or those English statutes passed before the emigration of our ancestors, and constituting a part of that law, by which, as English subjects, they were governed when they emigrated; or statutes made afterwards, of a general nature, in amendment or modification of the common law, which were adopted in the colony or province by general consent.

"In addition to these sources of unwritten law, some usages, growing out of the peculiar situation and exigencies of the earlier settlers of Massachusetts, not traceable to any written statute or ordinance, but adopted by general consent, have long had the force of law. * * * Indeed, considering all these sources of unwritten and traditionary law, it is now more accurate, instead of the common law of England, which constitutes a part of it, to call it collectively the common law of Massachusetts." Shaw, C. J., in Commonwealth v. Chapman (1847), 13 Metc. (Mass.) 68.

"For though the common law of England hath not, *as such*, nor ever had any force here; yet, in the progress of our affairs, whatever was imagined at the beginning, it long since became necessary, in order to avoid arbitrary decisions, and for the sake of *rules*, which habit had rendered familiar, as well as the wisdom of the ages matured, to make that law our own, by practical *adoption*—with such exceptions as a diversity of circumstances, and the incipient customs, of our own country, required. The same may be said of ancient English statutes, not penal, whose corrective and equitable principles had become so interwoven with the common law, as to be scarcely distinguishable therefrom." Fitch v. Brainerd (1805), 2 Day (Conn.) 163, 189.

The term, common law, is often used to differentiate the Anglo-American system from other systems, e. g., from the civil law which prevails on the continent of Europe. It is also frequently applied to designate the rules applied by the courts of common law as distinguished from the rules applied by courts of equity.

common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It is always the law of some state."[3]

The materials which the court will first examine in its search for the rule to be applied are prior judicial decisions. If it finds an applicable precedent, it will ordinarily determine the controversy accordingly; if it can find no previous adjudication on all fours with the case in hand, it will try to ascertain whether any available decisions have sufficient elements in common with it to require or justify an application of the rule used therein. If it finds a precedent squarely in point or applicable by analogy, but determines nevertheless that it ought not to be followed, or if it finds no pertinent precedent, it ought to, and generally will, decide the case as it believes a proper consideration of history, custom, morals, and sound social policy requires. Obviously in this process it does and must resort not only to judicial decisions of non-common law courts but also to non-legal materials; it gives due weight, in so far as it is able, to the known truths of all the sciences affecting human experience and human conduct. The resort to non-legal materials is not confined to the solution of common law problems; it is made, though perhaps to a less degree, in the interpretation and application of statutes.[4]

Equity. The jurisdictions of this country which adopted the English common law adopted also the English equity system; and the non-statutory rules administered by Courts of Equity are included in the term common law as ordinarily used. Originally, here as in England, the courts which administered these rules of equity and good conscience were separate tribunals. Later the same court sat at times to hear common law cases and at other times to try suits in equity. The distinctions, however, between the two classes of cases as to practice, procedure and jurisdiction remained. If a litigant brought his case in equity when he ought to have sued at common law, his case was dis-

[3] Southern Pacific Co. v. Jensen (1917), 244 U. S. 205, 222. This idea has not, however, met universal acceptance. For example, in St. Nicholas Bank v. State National Bank, 128 N. Y. 26, the defendant claimed that a certain contract was governed by the common law of Tennessee. To this Mr. Justice Earl replied: "There is no common law peculiar to Tennessee. But the common law there is the same as that which prevails here and elsewhere, and the judicial expositions of the common law there do not bind the courts here."

[4] See Cardozo, The Nature of the Judicial Process.

missed, and he had the privilege of beginning his action at common law before the same court. Under most modern codes the distinction between actions at law and suits in equity is abolished; and a litigant is not ordinarily turned out of court merely because he has sought equitable relief where he should have asked for legal relief. In some jurisdictions where the distinction persists, it is provided that a case which is brought on the wrong side of the court may be transferred to the other without undue delay or expense.

In seeking a proper rule for any pending cause the court having to decide an equitable issue proceeds in the same manner as a court of common law. Applicable statutes are controlling; prior judicial decisions of equitable tribunals come next, but all the other materials usable by any judicial body may be considered and given due weight.

Admiralty. The rules governing maritime causes have their foundation in "the ancient laws, customs and usages of the seas." The judicial power of the United States comprehends all cases of admiralty and maritime jurisdiction. When a United States court is trying a cause in admiralty, not only is its procedure different, but the substantive rules may also vary greatly from those which would be applied by the same court in a non-maritime cause involving the same facts. Of course, pertinent valid legislation, prior judicial decisions in admiralty, other legal materials and the known truths of the sciences affecting human experience and human conduct are operative here in influencing the court's determination of the rule which is to be employed to solve the problem presented, in the same manner as they are operative with courts handling a common law controversy or an equitable issue. The only diversity is that the applicable statutes, precedents and known truths will probably be different.

Law Merchant. The rules administered by courts of common law, equity and admiralty are binding upon all members of the community without distinction. The nature of the dispute or of the relief demanded determines which court has jurisdiction. The customs and usages of the sea originally applied in admiralty were in large part the customs and usages of marine merchants; and as early as the thirteenth century it was recognized in England that all mercantile transactions, maritime and

non-maritime, were governed by a body of rules inapplicable to non-mercantile matters. The non-maritime law merchant had a marked effect upon the development of the common law, and many of its rules were adopted *in toto* by the common law courts; but it did not succeed in becoming an independent branch or department of jurisprudence; nor were its provisions ever regarded either in England or in America as law for a particular class of persons as distinguished from a class of controversies or transactions.[5]

Canon Law. The rules which the ecclesiastical courts in England in the Middle Ages applied in the causes over which they exercised jurisdiction had a considerable influence in shaping the Anglo-American law of marriage, divorce, legitimacy and administration of decedents' estates. To that extent the canon law is one of the sources of our law of today. But no system of canon law has ever prevailed in the United States wherein a churchman could successfully claim not to be subject to the law of the land.

Military Law. Military law is thus defined in the Manual for Courts-Martial for the Army:

> "The legal system that regulates the government of the military establishment. It is a branch of the municipal law, and in the United States derives its existence from special constitutional grants of power. It is both written and unwritten. The sources of written military law are the Articles of War enacted by Congress June 4, 1920; other statutory enactments relating to the military service; the Army Regulations; this official Manual for Courts-Martial; and general and special orders and decisions promulgated by the War Department and by area, department, post, and other commanders. The unwritten military law is the 'custom of war,' consisting of customs of service, both in peace and war."[6]

This definition is inadequate in failing to cover the rules applicable to the naval forces. The sources of this branch of

[5] 1 Pollock and Maitland, History of English Law (2 ed. 1905), 466-467.

[6] See note 18 in Chapter I *supra*.

written military law are the Articles for the Government of the Navy, other statutory enactments relating to the naval service, navy regulations and instructions issued by the Secretary of the Navy, including General Orders, Uniform Regulations, Signal and Drill Books and Naval Courts and Boards.

The sources from which the unwritten military law may be deduced are decisions of the Courts of the United States, decisions of Courts-Martial, and opinions of the Judge Advocate General of the Army, of the Judge Advocate General of the Navy and of the Attorney-General.[7] Courts-martial like other judicial tribunals are frequently confronted with questions not soluble by statute or prior adjudication. In such cases they must and do act in much the same manner as other courts.

Law and Morals.[8] The generally accepted moral standards of the community will have a powerful influence upon a court in its quest for the rule to be applied to any controversy before it, but they will not necessarily be controlling. It must be remembered that the law does not have the same purpose as religion or ethics or morals. It is not concerned with developing the spiritual or moral character of the individual but with regulating his objective conduct toward his fellows. Consequently courts will have to formulate and apply some rules which have no relation at all to morals, some which have to place a loss upon one of two equally blameless persons, some which impose liability regardless of fault and some which refuse to penalize conduct denounced by even the morally blind.

It must be apparent that the moral law has no mandate upon the content of the rules of the road. Wherever a highway is much travelled, some regulations are necessary to prevent confusion and accident. But ethics is not concerned whether the traveller shall pass oncoming traffic upon the right or left, or whether he who approaches an intersection of highways from the right shall have the right of way over him who approaches from the left, or *vice versa*. After the rules are once established, a proper sense of morals may require all travellers to know and

7 *Ibid.*

8 See Ames, Lectures on Legal History, 435-452; 310-322. Pound, Law and Morals; Pollock, First Book of Jurisprudence (5th ed.), 46-54; 1 Pollock and Maitland, History of English Law (2d ed.), xxv-xxvi.

obey them, but morals has nothing to say as to what the rules shall approve or denounce. Again suppose that C steals A's chattel and sells it to B, whose conduct in purchasing it is quite beyond reproach; or that C by fraud induces A to sell A's chattel to C and C then sells it to B, who buys in good faith. In a controversy between A and B, the courts must place the loss caused by C's misconduct upon one of two morally innocent persons. How can ethics or morals assist in solving this problem? As a matter of fact, the courts favor A in the first case and B in the second, but on what ethical grounds can the cases be distinguished?

There are, however, situations where the currently accepted standards of ethics are deliberately disregarded by the law. A person who has exercised the greatest care that human foresight could conceive to prevent harm to another may nevertheless have to answer for such harm. The example which will immediately suggest itself is the common law rule which makes a master responsible for injury done by his servant in the scope of his employment regardless of the care which the master used in selecting the servant, in giving him adequate instructions, and in furnishing him proper instrumentalities. Perhaps the various workmen's compensation acts may be cited as another instance, for they impose liability without fault; but it may well be said that these merely require of the employer a standard of conduct which prevailing moral notions demand in the light of existing social and economic conditions. On the other hand it sometimes happens that for practical reasons the courts decline to enforce the most elementary precepts of ethics and morals. To refuse to perform a promise deliberately made, without the slightest change in circumstances and without the shadow of excuse for the refusal, is unquestionably bad morals; but unless the promisor has received a consideration or attached his seal to the promise, the common law ordinarily leaves him free to break it. "Thou shalt not bear false witness" is a command of religion and ethics, and yet the courts tell us that a judge, in the course of his official duty, may with impunity utter the following false and malicious slander concerning the plaintiff: "It is our opinion that this has been a gross attempt to blackmail. From what we have heard of this man, he has been in the habit of trying to extort money from persons by illegal means, and if he

found himself in gaol for twelve months, it would possibly do him a good deal of good."[9] For one robed in the authority of high judicial office to decide a case corruptly in order to satisfy his malice against one of the parties is to sin against the most obvious requirements of common decency, to say nothing of the principles of ethics. But the Supreme Court of Tennessee, following respectable precedents, held a judge not legally responsible to plaintiff against whom he "corruptly, maliciously, wickedly and oppressively" decided a disbarment proceeding.[10] Religion and morals may denounce covetousness, but the rich merchant may without legal responsibility crush out his small rivals by fierce competition, because he covets for himself their profits. In all these cases, and in many more that might readily be suggested, the courts refuse to give the injured person relief, not because they approve the conduct of the wrongdoer or do not appreciate the injustice done the injured party, but because considerations of expediency and policy make it impracticable to enforce in such circumstances the standards of conduct which religion, ethics or morals may demand.

[9] Law v. Llewellyn, [1906] 1 K. B. 487.
[10] (1902) Webb v. Fisher, 109 Tenn. 701.

CHAPTER III

MAIN TOPICS OF THE LAW

Divisions for Convenience. It has been frequently observed that the law is an indivisible unit. No part of it can be adequately appreciated except in its proper relation to the whole. Yet the subject is of so vast a content that for purposes of study it must be separated into divisions.[1] These must be more or less arbitrarily made, and they will of necessity gradually blend into each other. From one standpoint it might well be advantageous to consider the substantive law separately from the procedural or adjective law. Under the former would be studied those rules which declare the legal relations of litigants when the courts have been properly moved to action upon facts duly presented to them; under the latter, the means and methods of setting the courts in motion, making the facts known to them and effectuating their judgments. Still these grand divisions are too large for close examination, and further subdivision is required. The substantive law is often treated under three main topics, Contracts, Crimes and Torts.

Contracts. Among the rules which the courts of a society that has reached a comparatively advanced stage of civilization are called upon to declare and administer, are those having to do with the enforceability and enforcement of promises. Such promises as the courts hold to be enforceable are termed contracts. And the law of contracts consists in general of those rules which define what conduct, verbal or non-verbal, amounts to a promise, what circumstances must attend a promise to make it enforceable, what facts operate to justify or excuse non-performance or to discharge the promise, and what relief, if any, is to be given to persons injured by non-performance.

[1] Bishop, Non-Contract Law, 1; Pollock, First Book of Jurisprudence (5th ed.), 84.

Crimes. Every member of an organized society owes to the state, that is, to all the other members in their aggregate capacity, a duty to conform to such regulations as are prescribed by the state for its welfare as a state, as distinguished from the regulations prescribed for the welfare of the individual members as such. A violation of that duty constitutes a crime, and the violator is subject to punishment in a proceeding by the state. The law of crimes, or criminal law is composed of such regulations and of the rules which declare and delimit such duty, define the acts and omissions constituting its violation, and fix the penalties therefor. It would be easy to pick flaws in the foregoing statements were they offered as precisely correct definitions. But they are sufficiently exact to furnish a working idea of the scope of this field of the law.

Torts. To frame a nicely accurate definition of a tort, too, would be an unprofitable, if not impossible task. It has been attempted by many commentators and text-writers with indifferent success. Professor Wigmore would wish the term out of existence:

> "Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics!"[2]

But for purposes of discrimination it may be helpful to know what a thing is not; and a consideration of several standard definitions may give a practical notion of the characteristics of a tort and of the features which distinguish it from a crime or breach of contract. Salmond says:

> "We may accordingly define a tort as a civil wrong for which the remedy is an action for damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation."[3]

Bishop phrases it thus:

> "The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted

[2] Wigmore, Select Cases on the Law of Torts, VII.

[3] Salmond, Law of Torts (6th ed.), 7.

otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties."[4]

Professor Burdick has offered the following:

"A tort is an act or omission which unlawfully violates a person's right created by the law, and for which the appropriate remedy is a common law action for damages by the injured person."[5]

Comparisons. Some attributes a tort has in common with a breach of contract. The duty violated in both cases is one owed to an individual as such and not to the state; in both the relief obtained consists of damages; in both the remedy is an action brought by the injured party. But in contract the duty comes into existence only when the duty-bearer has voluntarily undertaken to assume it; the duty is merely to perform a promise. So, roughly speaking, it is sometimes said that the duty is created by the acts of the parties. What is meant is, that when a person's conduct amounts to what society through its properly constituted agencies declares to be an enforceable promise, society lays on him the duty to fulfill that promise. In tort, on the other hand, the duty is put upon the individual member of the community often merely because he is such member, and usually, if not always, regardless of whether he has voluntarily undertaken to assume it. It may be that the particular duty is imposed only because the duty-bearer has brought himself into a particular consensual relationship with another or others, for example, that of carrier and passenger, or of landlord and tenant. But the duty, violation of which is named a tort, is not merely that of fulfilling a promise made to that other or those others. And that is what Professor Burdick means when he says that the right infringed by a tort is "created by law." The characteristics which the tort and the breach of contract have in common distinguish each of them from the crime. The duty violated by a crime is one owed, not to an individual member of society as such but to the state; no relief is obtained by the

4 Bishop, Non-Contract Law, 3.
5 Burdick, Torts (3d ed.), 12.

injured party, and the wrongdoer is pursued, not in an action by the wronged, but in a proceeding instituted and prosecuted by and in the name of the state, the object of which is the punishment of the wrongdoer. But as in the case of the tort, the duty is imposed without regard to the will of the duty-bearer.

Examples. The same act or omission may or may not constitute both a tort and a crime according to the circumstances of the particular case. For example, if A while hurrying along the public street, carelessly but unintentionally collides with B and injures him, A invades B's private right to personal immunity, but he does no wrong to the state as such: he commits a tort but not a crime. If A is merely drunk and disorderly on a public street, or if A in the seclusion of his home intentionally maims himself, he violates his duty to conform to a regulation prescribed by the state for its welfare as such, although he does not infringe the right of any individual as an individual: he commits a crime but not a tort. But if A intentionally beats B upon the public street or if he intentionally maims B, he not only transgresses his duty not to interfere with B's person but he is also guilty of an infraction of a rule established by the state for its welfare as a state. He is subject to a civil action for damages by B and to a criminal prosecution by the state. Against B as an individual he commits a tort; against the state he commits a crime. Similarly the same act or omission may or may not be a tort and a breach of contract, or a tort, a crime and a breach of contract. If B has his chattel stored in a warehouse, and A, by acting as a reasonably prudent man would not act, injures that chattel, he violates his duty not to interfere unjustifiably with B's property, and commits a tort. If A, in consideration of a sum of money to him paid by B, promises B to guard and protect that chattel from injury and theft, and as before negligently injures it, he commits a tort as before, but he also breaks an enforceable promise and is guilty of a breach of contract. If after making the promise A steals the chattel, he breaks his contract as before; he also violates B's right to have his property free from unjustifiable interference, and he transgresses a duty owed by him to the state as such. His single act constitutes a breach of contract, a tort and a crime.

Quasi-Contract. Furthermore there are certain non-contractual duties for the violation of which redress is given in the form of action usually reserved for contracts. They are imposed by law in the sense that the consent or lack of consent of the duty-bearer to their creation is entirely immaterial. The wrong done by the transgression of such a duty would fit Professor Burdick's definition of a tort, but it is usually classified as a breach of quasi-contract, and in some instances the operative facts constituting the breach of duty would not support a tort action. Suppose that, after due process of law, B recovers a judgment against A upon a claim which A has from the beginning vigorously resisted; suppose further that A has consistently declared that he would never pay the claim or any judgment founded upon it. A still refuses to pay. Now clearly A has not interfered with B's person or property in any way; he has made and broken no promise to B; he has not violated a rule laid down by the state for its protection as a state. But just as clearly he is refusing to perform a duty to B which society through its duly authorized agent, the court rendering the judgment, has imposed upon him. If the entire field of law is occupied by Contracts, Crimes and Torts, the definition of one of these divisions must be so framed as to include this case; or a remedy may be provided for this breach of duty as if it did belong in one of these fields. The latter alternative has been chosen. B may bring his action and allege that A promised to pay the judgment. Of course he can never support this allegation by proof, but the courts have said that he need not so support it, because the promise will be implied. What they mean is that the duty is imposed upon A regardless of any intention, desire or promise on his part, and that B may have the same remedy as if A had promised; the duty is quasi-contractual, as if created by contract. Again, take the following case. A, falsely pretending to act as P's agent, collected from D a sum of money which D owed to P, and refused to pay it over to P or to return it to D. When A got the money from D, he committed a tort against D because D had the right not to have his money taken from him by such a fraud; as against the state in most jurisdictions A was guilty of a crime. But as against P, A cannot be said to have committed a tort; he made no misrepresentation to P and in no way interfered with his person or property. Nor did he break any

promise to P. Conceivably P should have no cause of action against A. Yet it is well settled that P may bring his action alleging that A promised P to pay the money over to P, and may succeed in the action without any proof of the promise. Here again A's duty to P is quasi-contractual. These two examples are sufficient to show that certain conduct may be a breach of a quasi-contract only, and that certain other conduct may, according to the aspect in which it is regarded, constitute a crime, a tort and a breach of quasi-contract. If to the facts in the second case is added an express promise by A to D to pay the money over to P, A's conduct would also be a breach of contract.

Further Subdivisions. The foregoing discussion has demonstrated the truth of Bishop's statement that the law is a partitionless whole, and that its division into subjects is useful only for convenience in study. And during the study of a particular topic the student must never forget that the total operative effect of any fact upon the legal relations of any person involved cannot be determined without a survey of the entire field. The division of the field of law into Contracts, Crimes, Torts and Quasi-Contracts is not sufficient for intelligent intensive study, and often it is advisable to make divisions which cut across two or more of these major divisions. For example, the average law school curriculum offers not only fundamental courses in Contracts, Crimes and Torts; it also provides for a study of special forms of Contract in courses on Sales, Negotiable Instruments, Suretyship, and Mortgages. The law of torts, contracts and quasi-contracts as applied to Property, Public Service Companies, Corporations, Partnership, and Agency is considered in separate courses. The effects given by the law to certain relationships, most of them having their inception in contract, are treated in courses on Public Service Companies, Agency, Partnership, Corporations, and Domestic Relations. Attention to rules governing procedure in the courts is given in courses on Pleading, Practice and Evidence; and those rules which were applied in the courts of equity as distinguished from the courts of common law form the subject matter of courses in Equity and Trusts. Indeed the extent to which the subdivision of the field may be carried depends upon the thoroughness and intensity with which any specified aspect of a subject is to be studied.

CHAPTER IV

PROCEDURE

Since the law may be taken to be the sum of rules administered by courts of justice and since such administration denotes the application of these rules to specific cases, it is natural to inquire in what manner a controversy is brought to the attention of the courts, how questions of law are raised and determined, how the facts are made known; in short, by what procedure the courts are moved to action. To answer these queries in detail would require volumes. It must suffice to indicate briefly what takes place in a lawsuit and how the court comes to deliver the opinion in which it sets forth its reason for its adjudication. But at least so much is necessary as a basis for an intelligent reading and a proper evaluation of the report of a judicial decision.

Beginning the Action. Suppose that Samuel Student and Peter Policeman have been engaged in an altercation. Student asserts that while he was peaceably walking along the street, Policeman without cause struck him with a club and severely injured him. He retains Lewis Lawyer to bring action against Policeman. After making as thorough an investigation as practicable, Lawyer is of the opinion that Policeman was at fault and ought to respond in damages. If this had happened under the old common law system in England, Lawyer's first task would have been to determine what writ and form of action would afford the proper remedy. In the next chapter the scope of the various forms of action and the importance of selecting the correct form are explained. Suffice it to say now that in this instance Lawyer would have gone or have had Student go to the Chancery Office for a writ in Trespass, which would have issued in substantially the following form:

> "The King to the Sheriff, greeting: If Samuel Student shall make you secure for prosecuting his claim, then put by safe gages and pledges Peter Policeman that he be before

us on the Morrow of All Souls wheresoever we shall be in England to show cause why with force and arms he made an assault upon the said Samuel Student at N and beat, wounded and illtreated him so that his life was despaired of and other enormities to him did to the great damage of him the said Samuel Student and against our peace. And have there the names of the pledges and this writ. Witness, etc."[1]

The sheriff would have summoned the defendant Policeman as commanded in the writ. On the designated day Policeman, let it be supposed, would have appeared and Student would have been there too. In earlier times these appearances would have been actually made in open court; and, as is explained in Chapter VI, the parties by oral pleading would have reached an issue. In later times the appearances would have been made by serving or filing written statements of appearance, and each pleading would have been written and would have been served or filed at prescribed periods of time.

Beginning the Action in New York. If this controversy occurs in New York to-day, Lawyer is not at the trouble of going to Chancery. He may start his action without an application to any court or official. He will first make out a summons in the following form:

Supreme Court of New York,
County of New York.

Samuel Student, Plaintiff,
against
Peter Policeman, Defendant.
} Summons:

To the above named Defendant,

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or

[1] See Maitland, Equity and the Forms of Action at Common Law (1909), 383.

answer, judgment will be taken against you by default for the relief demanded in the complaint.[2]

LEWIS LAWYER,
Attorney for Plaintiff,
24 Broadway,
Borough of Manhattan,
New York City.

He will cause this summons to be served upon the defendant, Policeman, by the sheriff or some indifferent person, who will make the service by handing to and leaving with Policeman a correct copy thereof. The complaint may, but need not, be attached to and served with the summons. If not so attached, the defendant may procure a copy of it by serving on plaintiff's attorney a notice of appearance and a demand for such copy. The complaint will read substantially as follows:

(Title as in the Summons, with "Complaint" substituted for "Summons.")

Comes now the plaintiff in the above-entitled action and for cause of action against defendant complains and alleges:

1. On January 1, 1926, the above-named defendant in the City and County of New York assaulted and beat the plaintiff, and with a stick and with his fists gave and struck the plaintiff a great many violent blows and strokes on and about his head, arms and body, and thereby broke plaintiff's right arm above the elbow and fractured plaintiff's skull.

2. By reason of the injuries so inflicted upon plaintiff by defendant, plaintiff suffered great bodily and mental anguish, and became permanently disabled and crippled for life, to his damage in the sum of $10,000.

3. Prior to the infliction of said injuries plaintiff was employed as an instructor in the X Y Tutoring School and was receiving a salary of $200 per month.

4. By reason of the injuries so inflicted upon plaintiff by defendant plaintiff was unable to attend to his business as tutor for a period of six months, and necessarily

2 New York Civil Practice Rule 45.

paid out for medical and surgical services the sum of $600.

Wherefore plaintiff prays judgment against defendant in the sum of $11,800, together with his costs and disbursements herein.

Beginning the Action in Connecticut. If the action is to be brought in Connecticut, the plaintiff or his attorney will apply for a writ of Summons to a justice of the peace, a commissioner of the Superior Court (and all duly licensed attorneys are such commissioners) or a judge or clerk of the court to which the writ is to be returnable. His attorney will in practice have the writ all ready for signature, and it will be in the following form:

To the Sheriff of the County of New Haven, his deputy, or either constable of the Town of New Haven in said county, greeting:

By authority of the State of Connecticut, you are hereby commanded to summon Peter Policeman of the City and County of New Haven to appear before the Superior Court to be holden at the City of New Haven within and for the County of New Haven, on the first Tuesday of March A. D. 1926 at 10 o'clock in the forenoon, then and there to answer unto Samuel Student of the City and County of New Haven in a civil action, wherein the plaintiff complains and says:

1. On January 1, 1926, the defendant assaulted the plaintiff and beat him with a cane and with his fists.

2. The plaintiff was then a tutor, receiving a salary of $200 per month.

3. Said battery broke plaintiff's right arm above the elbow and fractured his skull, and he was thereby disabled from attending to his business for six months thereafter and compelled to pay $600 for medicines and medical care and attention.

The plaintiff claims $11,800 damages.

I, John Williams, the subscribing authority, hereby certify that I have personal knowledge as to the financial responsibility of the plaintiff, and deem it sufficient.

Of this writ with your doings thereon make due return.
John Williams, Justice of the Peace.

The sheriff or constable will serve the writ by leaving an attested copy of it with defendant or at his usual abode.

Beginning the Action in Some Other Jurisdictions. In some jurisdictions the action is begun by filing with the Clerk of the Court the complaint and a Praecipe for a Summons. The Praecipe will usually be entitled with the name of the court and county, and with the names of the parties, as in the sample summons used in New York, set out above, and will be signed by the plaintiff or his attorney. The body of it will be substantially as follows:

"The clerk of the District Court will please issue summons in the above-entitled action returnable according to law."

or

"The clerk of the said court will issue a summons in the above-entitled action directed to the sheriff of the County of X, and returnable to the October term 1926."

The clerk of the court will issue a summons according to the request in the Praecipe, and the proper officer will serve it upon the defendant.

Raising and Deciding an Issue of Law. When Policeman is served with the summons, if he is wise, he will retain an attorney. Let it be assumed that he employs Arthur Andrew. Andrew's first task will be to examine the declaration or complaint. If it has not been served with the summons but is on file in the office of the clerk of the court, he may inspect it there and make a copy of it; if not on file, he may secure a copy from plaintiff's attorney. If after scrutinizing the complaint he is convinced that the facts alleged therein disclose no legal claim against Policeman, he may desire to challenge its sufficiency. He will have to make an appearance for Policeman. In some jurisdictions this is done by filing with the clerk of the court a statement that Peter Policeman appears by his attorney, Arthur Andrew; in others, by delivering to plaintiff's attorney a notice of such appearance or by serving on him a pleading in response to the

complaint. In attacking the complaint, at common law and under most codes, he will interpose a demurrer. (See Chapter VI.) In New York and a few other jurisdictions he will make a motion for judgment dismissing the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In either event the case will be brought on for argument before the court without a jury. The court will hear argument upon the question whether, assuming all the facts stated in plaintiff's complaint to be true, defendant has committed any wrong against plaintiff for which the law will give him redress in this action. But it will receive no testimony at all; the decision must be made upon the allegations of the complaint alone. If the court holds plaintiff's pleading insufficient, it will order judgment for defendant unless plaintiff prays and gets leave to amend: if it holds the pleading sufficient, it will order judgment for plaintiff unless defendant prays and gets leave to interpose a plea or answer. Under modern codes it is often provided that the order for judgment must contain such leave. Sometimes, but not often, the court in making its decision will render an opinion which will be printed in the regular law reports. If no amendment is made or plea interposed, judgment will be entered according to the order, unless by the local practice the order is appealable, and an appeal therefrom is perfected.

Raising an Issue of Fact. If Andrew determines that the complaint does require an answer on the facts, he will ascertain from Policeman his version of the occurrence. Let it be assumed that Policeman denies that he struck Student. After making an appearance for Policeman in the manner required by the local rules of practice, he will put in a plea of general issue or an answer of general denial (see Chapter VI), and thus raise an issue of fact for trial by a jury.

Bringing Issue of Fact on for Trial by Jury. It might be supposed that after the issue between Student and Policeman has thus been made by the pleadings, it would automatically come before the court and jury for trial. But not so. In most jurisdictions it might forever lie undetermined in the absence of further action by one of the parties. Courts hold series of sessions, known as terms, periodically. If Student's case is

pending in the New York Supreme Court and he wants it tried, his attorney must, at least fourteen days before the opening of a term of the court, serve upon Policeman's attorney a notice stating that the action will be brought on for trial at that term; he must also at least twelve days before the opening of the term file with the clerk of the court a note of issue, which is merely a request to the clerk to put it on the list of cases which are to be set for trial at that term. If the case is pending in the Connecticut Superior Court, Student's attorney will request the clerk in writing to put the case on the trial list; and the clerk will notify Policeman's attorney, ordinarily by mail, of this request. Usually the request should be made seven days before the opening of the term, but it may be made later, though never less than seventy-two hours before the opening of court on the day when the case is assigned for trial. In practically all other jurisdictions some such steps must be taken by one of the parties.

The foregoing notices and requests merely get the case in its regular order upon the trial list. It still has to be assigned for trial according to the local practice. In some places, on the first day of the term, the entire list or calender is called, a determination is made whether any of them are not ready for trial during the term, and the cases for trial by jury are separated from those for trial by the court. After the unready cases are eliminated, the others may be set for trial, each for a day certain, or all in the order in which they appear on the list as revised. In other places there is no call of the list, but at stated intervals a session of the court is held for the purpose of selecting from it cases for trial during a comparatively short period then next ensuing. For example, in Connecticut a brief session is usually held on Friday for the purpose of setting cases to be tried during the following week. In still other places, the selection of cases from the list is made by subordinate administrative officials of the court.

Trial of the Issues. Assume that the case of Student against Policeman has been set for trial in Court Room number one immediately after the case of Jones v. Smith. Both Lawyer and Andrew will have to be ready to go on immediately at the conclusion of the Jones-Smith trial. They will be on hand with their respective clients and witnesses. The court will order the

clerk to call the next case; and when he has said "Samuel Student against Peter Policeman," and the attorneys have answered that they are ready, the court will direct the clerk to call a jury.

Same—Getting the Jury. A juror must possess certain general and certain special qualifications to be eligible to act in a particular case. For example, he must usually be an elector of the jurisdiction, must not be related within a certain degree of consanguinity to either party and must be in such a state of mind toward the parties and the case as to be able to try the issue fairly and impartially. For alleged lack of any of these qualifications he may be challenged by either party, and if the challenge is found true, he will not be permitted to serve. Such challenges are termed challenges for cause. In addition by statute each party may without assigning any reason therefor, exclude a specified number of perfectly eligible jurors by peremptory challenge. The procedure with reference to challenge and to ascertaining and disclosing the reasons for challenge is not uniform. Among the various practices are the following: (1) The parties and their attorneys are confronted with the entire number of jurors summoned for service for the term and not then engaged in the trial of other causes. The attorneys, either directly or through the judge, are permitted to ask them as a body questions touching their qualifications to sit as jurors. If any juror discloses a probable ground for disqualification, he may be challenged and further examined; and even extrinsic evidence may be given to prove his ineligibility. If the challenge is found true, he is eliminated; otherwise not. After all ineligibles are thus removed, the clerk by lot selects twelve or twelve plus the number of peremptory challenges allowed, and after the peremptories are exercised or waived, the jury of twelve is sworn. (2) From among the jurors summoned for the term, usually called the panel or the array, the clerk selects by lot to the number of twelve or to the number of twelve plus the number of peremptories. The attorneys are allowed, directly or through the judge, to examine each of these individually as to his qualifications, and to eliminate by challenge for cause any who show themselves disqualified. If any juror is thus removed, he is replaced by another who is subject to examina-

tion as if originally drawn. After the requisite number of qualified jurors is obtained, the attorneys exercise their peremptory challenges. If the number is reduced below twelve, the process is continued until the peremptory challenges are exhausted and twelve qualified jurors are secured. (3) In England and Canada the jurors are selected by lot from the panel. As each juror comes to the box either attorney may challenge him for cause or peremptorily. If peremptorily, then no examination is necessary; if for cause, then he may put questions to the juror or present other evidence to support the challenge. But no questioning of a juror prior to challenge is allowed. (4) As each juror is chosen by lot by the clerk, he is examined by the attorneys, in a prescribed order, as to his qualifications. The attorney who first examines must exercise his challenge for all reasons before turning him over to the other attorney. If he finds no ground for challenge for cause, and yet desires the juror removed, he must exercise his peremptory challenge at once. In some states as soon as a juror is accepted by both sides, he is sworn to try the issues; in others the oath is not administered until twelve have been accepted.

Same—Opening Statements. After the jury is sworn, the plaintiff's attorney makes his opening statement. In Student against Policeman, Lawyer will explain to the jurors the exact questions raised by the pleadings which they will have to answer by their verdict, what Student asserts to be the facts and how he intends to support these assertions by evidence. In New York, he will be followed immediately by Andrew, who will outline Policeman's case and inform the jurors how he intends to meet and overthrow Student's claims. There is no place for argument in the opening. It is made simply to present to the court and jury an outline of the case, so that they may more easily and intelligently follow and apply the testimony. In some jurisdictions Andrew's opening will not be made until just before he is ready to offer his evidence.

Same—Evidence. Next Lawyer calls his first witness, who is sworn to tell the truth and nothing but the truth. By means of question and answer he gets from the witness what he knows about the matter in issue. Then Andrew has an opportunity to

cross-examine; and if he brings out any new matter or makes uncertain anything given in testimony on Lawyer's examination, the latter may re-examine the witness on these points. And in some instances the witness may be subject to several re-examinations by each attorney. The same procedure is followed with each witness offered in Student's behalf. Student will doubtless be one of them. After presenting all his witnesses on his main case, Lawyer will announce that he rests, that is, that he has no further evidence to offer. Thereupon Andrew will proceed with Policeman's side of the case. If he has not already done so, he will make his opening statement. Otherwise, he will at once call his witnesses, who will be examined, cross-examined and re-examined as were Student's witnesses; after which he will state that he rests. If the course of the evidence warrants it, Lawyer will have the privilege of presenting evidence in rebuttal, and Andrew in surrebuttal.

Same—Motions During Trial. At the close of plaintiff's evidence, the defendant may under modern practice move that plaintiff be nonsuited or that the action be dismissed on the ground that no reasonable jury could find a verdict in favor of plaintiff; and at the close of all the evidence either party may move for a directed verdict on the ground that no reasonable jury could return a verdict except in favor of the movant. In some jurisdictions this latter motion may be made by defendant at the close of plaintiff's testimony. If either motion is granted, it of course puts an end to the trial.

Same—Demurrer to Evidence. At the close of the evidence of the party having the burden of proof, the other party may at common law demur to the evidence. This demurrer must be in writing and be correct in form as well as substance if the opponent is to be required to join therein. Upon such joinder in a properly framed demurrer the court must take the case from the jury and order judgment for the demurrant only in case no reasonable jury could have found a verdict against him upon his opponent's evidence, taking that evidence to be true; otherwise it must order judgment for the opponent. In a few American jurisdictions the demurrer to evidence is treated in all respects as a motion for a directed verdict.

Same—Requests to Charge. If the motions to take the case from the jury are denied, and no demurrer to the evidence is interposed, or if interposed is treated as a motion to direct a verdict, and is denied, there is opportunity for each attorney to present to the judge written requests that he deliver certain instructions to the jury. These requested instructions will declare that the jurors in considering the testimony must apply certain rules of law in ascertaining the facts and in determining the effect to be given to the facts when found. In some jurisdictions the court is not obliged to give the jury any instructions which are not so requested. The court will advise the attorneys which of the requested instructions it will give in order that they may frame their summing-up arguments accordingly. At the close of the charge a further opportunity is given counsel in some jurisdictions to ask for additional instructions.

Same—Summing-up by Attorneys. These arguments usually come next, though in some states they follow the charge of the court. Ordinarily Lawyer, since Student has the burden of establishing his case, will open the argument, Andrew will answer him, and Lawyer will reply in rebuttal. In some jurisdictions Andrew will open the argument and Lawyer will close, each side having but one speech. In these arguments each attorney will be confined to the evidence and will not be permitted to indulge in prejudicial immaterialities. He will try, by his analysis of the testimony and of the method of applying it to the issues, to persuade the jury that its verdict should be in his favor.

Same—Charge of Court. The court will then deliver its charge to the jury. This is usually done orally; in some places the court is required to reduce the instructions to writing and let the jury take them to the jury room. In almost all of the states of the Union, this charge must not contain any comment upon the weight of the evidence or the credibility of the witnesses, but must be confined to expounding the rules of law which the jury should apply in reaching their verdict. In the Federal Courts, in Connecticut and a few other states, the court may express its opinion upon the weight of the evidence and the credibility of the witnesses. In England the charge is called the

summing-up by the court and consists of a review and analysis of the testimony and the opinion of the court on how it should be handled, as well as a statement of the rules of law governing the case which are to be applied by the jury.

Same—Verdict. At the conclusion of the charge the court places the jury in the custody of an officer, who conducts them to the jury room. In this room they deliberate upon the case in secret until they reach a verdict. In some places they deliver the verdict orally in court through their foreman; in others they return a written verdict signed by the foreman, and express oral assent thereto when it is read in open court. After the verdict is received by the court, the jury is discharged and the trial is at an end.

Motion in Arrest of Judgment. After the verdict, which may be assumed to be in Student's favor, the defendant may move that judgment be arrested on the ground that the declaration or complaint is fatally defective in wholly failing to state a cause of action, or that upon all the pleadings his case is fatally defective in substance. The question thus raised is the same as that raised by a general demurrer; but the court's attitude at this stage of the proceeding is to resolve every doubt in favor of the pleading, because it is now supported by the verdict. The motion in arrest may also attack defects in the verdict. Indeed, it may search out errors in so much of the common law record as has then been made, that is, the writ, the pleadings and the verdict. It does not reach errors in rulings made at the trial, which must be preserved by bill of exceptions. In determining this motion, the court may render an opinion which will find its way into the law reports.

Motion for Judgment Notwithstanding the Verdict. If the verdict had been in favor of Policeman, Student might have moved for judgment notwithstanding the verdict, had Policeman's sole defense been one in confession and avoidance, on the ground that the facts set up in the plea or answer were totally insufficient to constitute a justification, excuse or discharge. Here too the question would be essentially the same as on a general demurrer to the plea, except that the court would indulge every

reasonable presumption to support the pleading. In this case too the court might render an opinion which would be reported.

Under the codes, a provision is frequently found authorizing the court after verdict to order judgment notwithstanding the verdict if upon the evidence it ought to have directed the jury to return a verdict in favor of the party against whom it was in fact returned.

Motion for New Trial. Under modern practice the defeated party may usually make a motion for a new trial either before or after judgment has been entered upon the verdict. This motion is usually made on the ground that the trial court over the objection and exception of the movant made erroneous rulings during the trial, for example, in receiving inadmissible evidence, or in giving the jury an improper instruction.

Taxation of Costs. If the motions made after the rendition of the verdict are denied, Student's next step is to cause his costs and disbursements to be taxed. The procedure for this matter is almost universally regulated by statute, and statutes prescribe what costs shall be allowed and what disbursements may be taxed. The defeated party is generally required to be given notice and opportunity to object.

Judgment. Student will next cause judgment to be entered upon the verdict. The verdict, of course, is merely a finding of the jury. In Student against Policeman, it will read: "We, the jury, find a verdict in favor of plaintiff and assess his damages at $5,000." The judgment is an order of the court that a party do have certain relief; it will read in part: "It is ordered and adjudged that plaintiff, Samuel Student, have and recover of defendant, Peter Policeman, the sum of $5,000 together with the sum of $75.90 costs and disbursements as taxed, amounting in all to $5,075.90."

Review by Appellate Court. When an issue of law has been finally determined by a trial court upon demurrer, or an issue of fact has been decided after trial by jury or by the court without a jury, the defeated party may usually have the proceedings of the trial court reviewed by a higher tribunal. A record of the

proceedings must be made up and transmitted to the reviewing court according to the rules of local practice. Everywhere this record must contain a correct statement of so much of what occurred at the trial as to show the alleged mistakes of the trial court, the defeated party's objections and exceptions to them, and their bearing upon the issues which were tried, and it must be certified as correct by the trial court. The orthodox method of securing a review in a common law action is by writ of error; in equity by an appeal. Under modern codes the usual method is by a statutory appeal. In common law actions the review is usually confined to errors of law occurring in the trial court; questions of fact are not re-examined. In equity suits an appeal is said to require a trial *de novo* on law and facts; ordinarily, however, the appellate court does not take new testimony but makes its decision upon questions of fact upon the evidence submitted below. In Student against Policeman, the latter's remedy will be by writ of error or statutory appeal. His attorney will generally be required to take the following steps, though the order of procedure may vary in different jurisdictions. (1) Notify the court, usually through its clerk, and opposing counsel of his appeal to the higher tribunal. (2) Have made up a record—a bill of exceptions or settled case—which he proposes as an adequate and proper statement of so much of the proceedings before the trial court as will be pertinent to the matters to be reviewed; this will be submitted to Lawyer, who will have opportunity to suggest corrections and additions; and after a hearing, if necessary, the trial court will certify the record as originally made up or with such changes as it deems necessary. (3) See to it that this record and the required original papers are transmitted to the higher court. (4) Prepare a brief, which specifies the errors upon which he relies for reversal and the reasons and authorities supporting his contentions; and furnish the required number of copies of it to the court and to Lawyer. (5) In some jurisdictions see to it that the case is properly put upon the calendar of the higher court for argument, and notify Lawyer of it. Lawyer will prepare a brief in opposition and furnish copies of it to Andrew and to the court. At the appointed time Andrew and Lawyer will appear before the higher court and present their oral arguments. The court will take the case under advisement and later render its decision.

A record will be made of all the proceedings in the higher court, and a portion of that record including the court's opinion will usually be printed in the official reports of the court. Usually the appellate court will remand the case to the trial court for entry of the proper order or judgment or for further appropriate proceedings.

Law Reports and Books of Selected Cases. A description of the books in which cases decided by the courts of Great Britain and the United States are reported is given in Chapter VIII. Books of Selected Cases for use in law schools are made up by selecting appropriate cases from these reports. Most of these selected cases consist chiefly of the reported proceedings in courts of last resort and intermediate appellate courts; some of them are records of proceedings before a trial court upon a demurrer, a motion in arrest of judgment or for judgment *non obstante veredicto,* or of proceedings before the full bench upon such a motion or upon a motion for a new trial; and a few of them are transcripts of records of proceedings at the trial in courts of first instance.

CHAPTER V

FORMS OF ACTION

After the Norman Conquest, as shown in the first chapter, the king's courts gradually absorbed all the judicial business of the kingdom, and the method by which litigation was drawn into the royal tribunals was the issuance of a royal mandate, commonly called an original writ, that is, a writ originating an action or lawsuit. The development of the system of original writs may be briefly summarized as follows: At the beginning of the Norman period the jurisdiction actually exercised by the royal courts was very narrow. But the king had the power to draw to his courts, by the issuance of special writs, each manufactured for a particular case, such causes as he desired; and he exercised this power with increasing frequency. Under Henry II the royal judicial power was greatly extended. A royal writ was necessary to compel a man to answer for his freehold. Actions for the recovery of possession of realty in the king's court were invented. In a steadily growing number of other classes of cases, the king through his chancery was issuing writs as of course. Indeed it began to look as if the royal courts, either through writs of course or special writs created for the purpose, might provide a remedy for every wrong. Under John a slight check occurred; but under Henry III the stream of writs issuing from chancery rapidly widened. As early as 1244 the barons and prelates protested. Gradually it was being perceived that the king by his invention of new writs was legislating and was frequently creating new rights. Finally in 1258 the barons extracted from the king, in the Provisions of Oxford, the pledge that his chancellor should be under oath to "seal no writs, excepting writs of course, without the commandment of the king and of his council, who shall be present."[1] Thereafter no new writs could be granted by the chancery; and this meant that, so far as the royal

[1] Stubbs Select Charters (9th ed.), 378, 380, 382, 384, 386.

courts were concerned, a litigant whose case could not be brought within the confines of a formed writ was remediless.

At this time the writs applicable to real and mixed actions were numerous. These actions have long since been abolished. Their history, while interesting and instructive, has such a comparatively unimportant bearing upon the problems of a first year student as to forbid its consideration here. The personal actions for which writs of course were provided were (1) Replevin, (2) Debt, (3) Detinue, (4) Covenant, (5) Annuity, (6) Account, (7) Trespass. Later (8) Case, (9) Ejectment, (10) Assumpsit, and (11) Trover were evolved. In most jurisdictions these forms too have been superseded by a single form of action created by statute. In the few jurisdictions where they still survive they have been greatly changed. But they have played so important a part in the development of our law, and so many cases still cited and accepted as precedents, and required to be studied by the beginner, turn upon the question whether the proper form of action has been used, that they demand at least a brief notice.

Importance of the Forms of Action. When the medieval litigant or his lawyer applied to chancery for a formed writ, he was in effect asking for a mandate to the royal judges to take jurisdiction of and to try a cause of action properly falling within the limits of that writ. The writ was no general order or authorization to try the validity of any claim which the plaintiff might choose to assert against the defendant. If plaintiff had selected and secured a writ in debt, he could not expect the judges to try a case in trespass. As Pollock and Maitland put it:[2]

> "The metaphor which likens the chancery to a shop is trite; we will liken it to an armoury. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbor comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use his cross-bow as a mace. To

2 2 Pollock and Maitland, History of English Law (2 ed.), 561.

drop metaphor, our plaintiff is not merely choosing a writ, he is choosing an action, and every action has its own rules."

And this remained true as long as the formulary system endured. Professor Maitland, in pointing out the practical importance of distinguishing between the several forms of action, said:[3]

> "'A form of action' has implied a particular original process, a particular mesne process, a particular final process, a particular mode of pleading, of trial, of judgment. But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong."

The truth of the foregoing is dramatically illustrated in many a case in our American reports. A failure to keep it steadily in mind will frequently result in a complete misinterpretation of a decision. For example, suppose that plaintiff brings an action of trespass against a railway company and alleges that he was a passenger upon defendant's railway and had paid the fare which entitled him to be carried from station A to station M, that he was by defendant wrongfully compelled to leave the train

[3] Maitland, Equity and the Forms of Action, 298.

at way station G; that as a result thereof he had to remain at G for a period of twelve hours, suffered greatly from cold, hunger, fatigue, and anxiety, so that he became sick, sore, and disabled, to his damage in the sum of $5,000. The defendant contends that plaintiff has stated no ground for recovery, and the court sustains the defendant's contention. Is the court declaring that the defendant has done the plaintiff no wrong for which the law will give him redress, that a railway company has the legal privilege to compel a passenger to interrupt his journey in this fashion?[4]

Or suppose that plaintiff has brought an action in debt alleging that defendant is indebted to him in the sum of $500, and defendant has denied the debt. At the trial plaintiff proves that defendant negligently damaged some of plaintiff's goods, that plaintiff made a demand on defendant for compensation, that defendant promised plaintiff that if plaintiff would have the goods repaired defendant would pay the bill, that plaintiff thereafter had the goods repaired and that the bill for such repairs was $500, that plaintiff presented the bill to defendant, that defendant stated that the bill was correct and he would pay it, but later he repudiated his promise and refused to pay it. The court decides for the defendant. Does this decision mean that plaintiff has no cause of action at all against the defendant, or that he has no cause of action except for the original negligence? Is this an authority that there is no action for breach of an accord executory?[5]

Again, suppose that plaintiff brings an action of trover against the defendant, and at the trial the following facts are shown without dispute. Plaintiff leased certain premises from defendant to be used as a butcher shop. The lease was signed before the front wall of the building was completed, and plaintiff moved in through this front part a very large refrigerator. At the termination of the lease plaintiff requested permission of defendant to remove the front show windows for the purpose of taking out the refrigerator and promised to replace the windows. Defendant refused to allow plaintiff to enlarge any of the means of egress from the building or to remove such windows, and it was otherwise impossible for plaintiff to remove the refrigerator

4 See Barnum v. Baltimore & Ohio R. Co. (1871), 5 W. Va. 10.

5 *Cf.* W. F. Parker & Son v. Clemon (1908), 80 Vt. 521, 68 Atl. 646.

without cutting it into pieces and thereby destroying it. Defendant was entirely willing that plaintiff should remove the refrigerator or any part thereof through any of the then existing ways of exit from the building. If the court holds that judgment must be entered for the defendant, will its decision be a precedent to be used in a later lawsuit on substantially the same facts where the plaintiff sues in an action on the case, or under a modern code in a formless action? May it be properly cited to show that defendant has violated no legal duty owed to the plaintiff?

None of the foregoing queries can be safely answered, or indeed answered at all, without considering with great care the scope of the action used. In the first case the decision is merely that the wrong of which the plaintiff complained was not remediable in an action of trespass; in the second, that plaintiff's proof did not disclose an obligation on the part of defendant for breach of which an action of debt would lie; in the third, that upon the undisputed facts plaintiff had no cause of action in trover. In announcing its decision, the court might indicate whether in its opinion plaintiff would have fared better had he employed some other form of action; but any observations upon this point would not be essential. And in evaluating the decision, this must not for a moment be overlooked by judge, lawyer or student. It will, therefore, be advisable to devote a little attention to each of the above-mentioned forms of personal action.

Replevin. This is one of the oldest of the formed actions.[6] It owes its origin to the policy of the royal courts to keep the exercise of the privilege of distress within bounds. In medieval England a feudal lord was at liberty to distrain his vassal's chattels for failure of the latter to render his feudal services or for arrears of rent, that is to say, he might lawfully seize the chattels found upon the tenement and keep them until the tenant either tendered what was due or gave security to try in a proper

[6] Replevin of land seized for default of appearance in a writ of right and replevin of men in arrest were anciently known but are not treated here because they have no bearing upon the modern action. Glanville gives the form of the writ. Among the earliest cases are Abbot v. Croft (*temp.* Rich. I), 24 Pipe Roll Soc. 240; Kingswood v. Hereford (1200), 2 Rot. Cur. Reg. 233; Alanson v. Warren (1201), 1 Curia Regis Rolls 408; Bukerel v. Acstede (1230), Br. N. B. pl. 477. *Cf.* Ames, 65, n. 1.

court the validity of the caption. In certain other cases also distraint was permitted, as where trespassing animals were taken doing damage.[7] If the distrainor refused to return the chattels when proper security was offered or if he wrongfully levied a distress, the distrainee's remedy was the action of replevin. From chancery he obtained a writ requiring the sheriff to retake the chattels and hand them back to him. Thus whether the distress had been wrongfully or rightfully levied, the plaintiff secured the return of his goods without giving the defendant an opportunity to be heard. Plaintiff was required to furnish pledges that he would prosecute the action. But if pending the trial, he disposed of the goods and became insolvent, the defendant was deprived of his remedy of distress. To prevent this undesirable result, the statute of Westminster II, chapter 2 (1285), required the plaintiff to give security for the return of the chattels in case the lawsuit terminated in defendant's favor. If plaintiff won, he kept the chattels and recovered damages for the wrongful detention; if he lost, he had to return the goods to the defendant.

Because of the expense and delay necessarily incident to procuring a writ from chancery by those living far from Westminster, the Statute of Marlebridge (1259) authorized the sheriff to make the recaption from defendant and delivery to plaintiff upon the complaint of the plaintiff without a royal writ. This soon became the usual method of commencing a replevin action.[8] The trial occurred before the sheriff in the County Court, wherein for this purpose he presided as a royal justiciar.[9]

Originally the defendant lord could defeat the action by claiming ownership of the chattels when the sheriff sought to replevy them. To avoid the dishonest use of this too easy device, the writ *de proprietate probanda* was invented, which authorized the sheriff, in such cases, to take an inquest of ownership. If owner-

7 See Gilbert, The Law of Replevins, Chap. I, and Ames, Lectures on Legal History, 64, for further details as to distress.

8 See Stephen, Pleading (Williston's ed.), *19, note m: "The action of replevin here mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the Court of Chancery, directed to the sheriff."

9 Bracton, De Legibus et Consuetudinibus Angliae, folio 155; 2 Pollock and Maitland, History of English Law (2d ed.), 577.

ship were found in defendant, the action terminated; otherwise it went on and defendant might plead ownership as a defense. Originally also a plea of ownership or property in defendant ended the action, but early in the reign of Edward III (1327-1377) it was treated only as a plea to the declaration.[10] Early in the fourteenth century and thereafter pleas of property in a third person coupled with a denial of property in the plaintiff are common;[11] and the modern cases show a conflict of authority as to whether plaintiff from whose possession defendant wrongfully takes a chattel must show that his possession was rightful as against the whole world or only as against the defendant.[12]

Near the end of the fifteenth century the scope of the action was expanded by judicial decision to cover wrongful seizure of chattels whether by way of distress or otherwise.[13] Some attempts were later made to bring within its limits relief for the wrongful detention of goods which had come into defendant's possession without any previous taking, that is, to extend replevin to cases of mere wrongful detention; but in England and the majority of jurisdictions the courts refused to go so far without the aid of legislation.[14] The early cases had no difficulty in allowing plaintiff to recover damages where defendant had wrongfully parted with possession; but the American cases are in conflict on this point.[15]

One of the early methods of trial in this action was compurgation or wager of law.[16] It was common before the sheriff in the County Court[17] and was not unknown in the royal courts.[18]

10 See Morris, Replevin, 17-30; Ames, Lectures on Legal History, 66-69; 3 Street, Foundations of Legal Liability, Ch. XVI. For a somewhat similar scheme of the tenant to defeat the landlord's plea in justification, see Gilbert, The Law of Replevins, 73, 129 *et seq.*

11 34 Yale Law Journal 72-87.

12 See Walpole v. Smith (1837), 4 Blackf. (Ind.) 304; Waterman v. Robinson (1809), 5 Mass. 303; Anderson v. Gouldberg (1892), 51 Minn. 294.

13 Ames, Lectures on Legal History, 69-70.

14 See Osgood v. Green (1855), 30 N. H. 210 for a case adopting the minority view after discussing the authorities.

15 See Sayward v. Warren (1847), 27 Me. 453; Ramsdell v. Buswell (1867), 54 Me. 546.

16 2 Pollock and Maitland, History of English Law 634, n. 8.

17 Ames, Lectures on Legal History, 65.

18 Bracton's Note Book, pleas 477, 741.

When defendant denied the wrongful caption and detention, he "waged his law," that is, he gave pledges that on a later day fixed by the court he would appear with a specified number of oath-helpers and "make his law." On the day set, he and his oath-helpers came into court. He swore that he did not take and detain the chattels as alleged by plaintiff; and his oath-helpers, according to the earlier form, swore that he spoke the truth; according to the later form, that they believed that he spoke the truth.[19] If defendant and his oath-helpers repeated the proper oaths with the requisite precision, judgment was given for defendant; if they or any of them failed, the "oath burst," and judgment went for plaintiff. Toward the end of the thirteenth century, this mode of trial was obsolescent, if not obsolete, in the royal courts; and trial by jury soon completely displaced it.

Debt. In a writ of right for land the sheriff was directed to command the tenant (defendant) justly and without delay to render to the demandant (plaintiff) a certain piece of realty which the demandant claimed to be his right and inheritance and of which he complained that the tenant was unjustly deforcing him.[20] And unless the tenant did so, he was to be summoned before the justices to show why he had not done it. In the writ of debt, as given by Glanvill, the sheriff is ordered to command

19 The form of oath of the oath-helpers in Anglo-Saxon times was the following: "By the Lord, the oath is clean and unperjured which N has sworn." Henry C. Lea, Superstition and Force (3d ed., 1878), 53. The procedure in 1699 in an action of debt is described in the report of an anonymous case in 2 Salkeld 682: "The defendant waged his law, and a day was given upon the roll for him to come and make his law; and now upon the last day of the term he came. * * * And the defendant was set at the right corner of the bar, without the bar, and the secondary asked him, If he was ready to wage his law? He answered, Yes; then he laid his hand upon the book, and then the plaintiff was called. * * * Then the Court admonished him (i. e., the defendant) and also his compurgators, which they regarded not so much as to desist from it; accordingly, the defendant was sworn, that he owed not the money *modo & forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

20 This was the "*Praecipe in capite*," not the "*Breve de recto tenendo*."

the defendant to render to plaintiff a specified sum of money which defendant owes to plaintiff and of which he unjustly deforces him. And if he will not do it, he is to be summoned before the justices to show why he has not done it. The writ of debt seems to have been a writ of right for money; the action to have been a real action.[21] The conception of the courts of that time was that the debtor was holding back something which he had granted, and which therefore actually belonged, to the creditor, not that he was merely under an obligation to pay money. Indeed, the action lay for chattels as well as for money.

The plea rolls of Richard I (1189-1199) and of John (1199-1216), as well as the treatise of Glanvill, show this action to be one of the earliest formed actions, but its use was rather infrequent until near the end of Henry III's reign (1216-1272). By that time the form of the writ had somewhat changed. It no longer spoke of deforcing plaintiff of the money but simply of unjustly detaining it. It was employed "but rarely save for five purposes: it was used, namely, to obtain (1) money lent, (2) the price of goods sold, (3) arrears of rent due upon a lease for years, (4) money due from a surety (*plegius*),[22] and (5) a debt confessed by a sealed document. We cannot say that any theory hemmed the action within these narrow limits. As anything that we should call a contract was not its essence, we soon find that it can be used whenever a fixed sum, 'a sum certain,' is due from one man to another. Statutory penalties, forfeitures under by-laws, amercements inflicted by inferior courts, money adjudged by any court, can be recovered by it. This was never forgotten in England so long as the old system of common law pleading was retained."[23]

In these early precedents is found ample justification for the

21 2 Pollock and Maitland, History of English Law, 204-206.

22 See 2 Pollock and Maitland, History of English Law, 191. "We must remember that in very old times the surety or pledge had in truth been the principal debtor, the creditor's only debtor, while his possession of the *wed* gave him power over the person whose *plegius* he was." P. 211. "The action against the surety has had its own separate history." P. 211, n. 4. "So late as 1314 (Y. B. 7 Edw. II f. 242) an action of debt is brought against a surety who has not bound himself by sealed instrument." This was one of the cases where under the later law debt would not lie.

23 2 *Id.* 210.

wide scope of the modern action, which lay in four chief classes of cases. The writ was the same in all classes. The distinctions were taken in the pleadings and in the mode of trial. The declaration in each case set forth the *causa debendi.* A plea which might properly be interposed in one class might be demurrable in another; and the course of the subsequent pleadings depended upon the plea.

1. Debt on a record was debt brought to recover money due on a record, for example, on a judgment of a domestic court of record. When debt was brought to recover on a judgment of a foreign court, whether of record or not, or upon a judgment of a domestic court not of record, the course of the pleadings was not that of debt on a record. The defendant might plead the general issue, "*nil debet,*" whereas in debt on a record the general issue was "*nul tiel record,*" and *nil debet* was not a proper plea.

2. Debt on a statute lay where the plaintiff was seeking to recover a definite sum due from defendant as a penalty or forfeiture under a statute. For example, where a statute provided that for an infringement by A of a specified right of B, A should forfeit a fixed sum to B, B might have an action of debt, but not where the statute allowed B multiple damages rather than a fixed sum. *Nil debet* was a proper plea.

3. Debt on a specialty or debt on a bond was used for the recovery of money which the defendant had promised to pay, or had admitted to be owing, to plaintiff in a writing under defendant's seal. Here *nil debet* was not a proper plea. The so-called general issue was *non est factum.*

4. Debt on a simple contract was the phrase commonly used to describe the action (a) when brought to recover on defendant's unsealed promise to pay money in exchange for a *quid pro quo* received by him, as, for example, for goods sold and delivered or services rendered; (b) when brought to recover on an obligation imposed upon defendant by law, other than statute or record, to pay a liquidated sum, as, for example, on a foreign judgment, or on a judgment of a domestic court not of record, or for money received and kept by defendant under such circumstances that the law created a duty on him to pay it over to the plaintiff. Here *nil debet* was the plea of general issue.

The early cases lay much stress upon the requirement that the

claim sued upon must be for a definite amount. Indeed, Ames says:

> "The ancient conception of a creditor's claim in debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *praecipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in detinue for the recovery of a horse and could prove only the detention of a cow. . . ."[24] "The obligation must be for a definite amount. A promise to pay as much as certain goods or services were worth would never support a count in debt."[25]

But it was not long before the courts were allowing the plaintiff to recover a smaller sum than that stated in the writ if the obligation proved was for a specified amount.[26] Later the "sum certain" was certain enough if its amount could be determined by extrinsic evidence before action brought. The English courts probably never went further than this.[27] But certainly many of the later American cases permitted debt to lie for the reasonable value of goods sold, and services rendered, where that value was determined only by the verdict of the jury.[28]

Originally trial by battle, as in the old real writ of right for land, was probably allowed, but no reported case of its use has been found. In debt on a simple contract, the defendant had the privilege of proof by compurgation, but it is doubtful if this was true in debt on a statute. In the seventeenth and eighteenth centuries, the courts imposed some limitations upon this privilege, but it was not until 1833 that it was abolished.[29] In debt on a record and debt on a specialty wager of law was not permitted in the royal courts. If the record was denied, trial by inspec-

24 Ames, Lectures on Legal History, 88.

25 *Id.* 89.

26 *Id.* 90; Ingledew v. Cripps (1702), 2 Ld. Raymond 814.

27 See Ames, Lectures on Legal History, 89, n. 9: "I Chitty Pl., 7th ed., 351, 721, gives a precedent of such a count, but says it has been doubted whether it lies. There is no case of it."

28 Thompson v. French (1837), 10 Yerg. (Tenn.) 452; Norris v. Windsor (1835), 12 Me. 293; Van Deusen v. Blum (1836), 18 Pick. (Mass.) 229.

29 Thayer, Preliminary Treatise on Evidence, 24-34. See note 19 *supra*.

tion and examination of the record was the proper procedure.[30] In debt on a specialty trial was normally by jury.[31] After 1833 disputed questions of fact in an action of debt had to be tried by jury as in other actions.[32]

Detinue. Originally this action and debt were identical. As stated above, debt lay for chattels as well as for money. A loan of money, a loan of grain to be consumed or used for seed, and a loan of a chattel to be returned in specie were not distinguished. Of course the lender did not expect to get back the very coins or grain with which he had parted, but he did count upon receiving again his horse or his plow. This distinction in fact began to manifest itself in the language of the writ and of the pleadings. The borrower owed and unjustly detained the money or the grain; he only unjustly detained the horse or the plow. Detinue slowly branched off from debt.[33] Debt lay for money or for a fixed amount of unascertained chattels, detinue for a specific ascertained chattel.[34]

At first detinue lay only by a bailor against his bailee. The plaintiff's declaration must allege a bailment and a wrongful detention by the bailee, and failure to prove the bailment was fatal to plaintiff's case. It was expanded to cover wrongful detention of a chattel, first, by one who received it from the bailee by will or intestate succession, next, by one to whose hands it came by whatsoever means after the bailee's death, and then

30 Stephen, Pleading (Williston's ed.) *112: "The trial by the record applies to cases where an issue of nul tiel record is joined in any action * * * and the court awards in such case a trial by inspection and examination of the record. Upon this, the party affirming its existence is bound to produce it in court, on a day given for the purpose; and, if he fail to do so, judgment is given for his adversary. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue. * * *"

31 See Ormsby v. Loveday, Y. B. 4 Ed. II, 11 (1310); Finchingfeld v. Byrcho (1311), *id.* 153; Upton v. Milton (1311), *id.* 156. But *cf.* 2 Pollock and Maitland, History of English Law, 224 and cases cited in note 2.

32 See Childress v. Emory, 8 Wheat. (U. S., 1823) 642, 675, where Mr. Justice Story doubts whether wager of law ever existed in the United States.

33 2 Pollock and Maitland, History of English Law, 173-176.

34 Ames, Lectures on Legal History, 89.

by one who got it from the bailee during the bailee's lifetime.[35] At a comparatively early period also it could be maintained by a third person to whom the bailee had promised the bailor to deliver the bailed chattel.[36] As debt lay against the buyer for the price of goods sold and delivered, so detinue lay against the seller for goods bargained and sold but not delivered, for which the price had been paid. The title had passed to the buyer, and the seller was thereafter a mere bailee. But what of the case where the title had passed, but the agreed price had not been paid? Here the seller had received no *quid pro quo* except the buyer's promise. If that promise were embodied in a specialty, the sealed instrument might well serve as the *quid pro quo*. If it were a mere oral or unsealed promise, however, there was more difficulty. Yet might not the transaction be regarded as one of mutual grants, the seller a bailee of the chattel, the buyer owing and detaining the money, justly until it was due and unjustly thereafter? So the courts came to look at it by the middle of the reign of Henry VI (1422-1461).[37]

In the fourteenth century cases are found in which detinue is held the proper remedy to recover a chattel lost by the plaintiff and found in the possession of the defendant who has refused to surrender it on proper demand. The classic declarations in detinue accordingly contain an allegation of bailment by plaintiff or of a loss by plaintiff and an allegation of wrongful detention by defendant; and the bailment or loss originally had to be proved as alleged.[38] About the end of the sixteenth century the courts declared the allegation of bailment or loss to be mere matter of form. The defendant was not permitted to deny it, and plaintiff was not required to support it by proof.[39] The wrongful detention was the gist of the action, and detinue came to be a remedy for any wrongful detention of a specific ascertained chattel regardless of the manner in which the defendant acquired possession of it.

If the plaintiff was successful he was entitled to either the

35 *Id.* 73, 74.
36 *Id.* 73, n. 1; 77, n. 1.
37 *Id.* 77, 78.
38 *Id.* 78, 82, 184.
39 2 Pollock and Maitland, History of English Law, 176; Ames, Lectures on Legal History, 184.

chattel itself or its value as assessed in the action plus damages for the wrongful detention. Since plaintiff's theory is that the chattel is still plaintiff's, the value is assessed by the jury as of the date of the trial. The defendant, however, has the option of handing back the chattel or of paying over the value as assessed.[40] The theory of plaintiff's present ownership and the consequent measure of damages, and the fact that defendant has such an option have given the courts some trouble in handling the case where defendant has wrongfully parted with possession of the chattel or has destroyed it. It seems pretty generally agreed that the action lies notwithstanding that defendant no longer possesses the chattel,[41] but the few American cases in point seem to deny the action where the chattel has been destroyed before action brought.[42] They seem to exhibit an undue tenderness for a wrongdoer.

In detinue, as in debt on a simple contract, defendant might defeat plaintiff's claim by successfully waging and making his law, until 1833. Thereafter, of course, trial was normally by jury.

Covenant. No writ for this action is given by Glanvill; but as early as 1201, if not 1194, the action appears in the plea rolls,[43] and the first register of writs (1227) contains the writ.[44] The action was certainly in common use toward the end of Henry III's reign (1216-1272). Nearly all the early cases have to do with agreements (*conventiones*) concerning land or concerning incorporeal things which the medieval courts conceived to be, like land, capable of seisin. They are chiefly of three main classes.[45] (1) Actions to enforce the terms of a lease of land for years. Pollock and Maitland say covenant was invented principally for this purpose. The lessee was regarded as having no

40 2 Pollock and Maitland, History of English Law, 174; Maitland, Equity and Forms of Action, 355, 356.

41 Jones v. Dowle (1841), 9 M. & W. 19; Wilkinson v. Verity (1871), L. R. 6 C. P. 206; Walker v. Fenner (1852), 20 Ala. 192.

42 Caldwell v. Fenwick (1834), 2 Dana (Ky.) 332; Lindsey v. Perry (1840), 1 Ala. 203. But see Ames, Lectures on Legal History, 72.

43 2 Pollock and Maitland, History of English Law, 216, especially n. 2.

44 Maitland, History of Register of Original Writs, 3 Harv. L. Rev. 97, 110, 113.

45 2 Pollock and Maitland, History of English Law, 217.

interest in the land, but by the use of this action he could secure specific performance of the lessor's agreement. (2) Actions brought merely that they may terminate in a compromise—usually called a final concord or a fine—which amounted in fact to a conveyance by one of the parties to the other with the approval of the court. (3) Actions to enforce covenants for refeoffment, made in the course of family settlements by way of feoffment and refeoffment. There was, however, nothing in the nature of the writ or of the action to confine it to so narrow a field. That this was recognized is shown by the recital in the Statute of Wales (1284) of the impossibility of mentioning by name each of the infinite number of enforceable covenants. But there was a notable exception. The more ancient action of debt lay to recover a sum of money promised to be paid by defendant in a writing under his seal. This seems to have been deemed a sufficient reason for denying such a promisee the action of covenant until near the opening of the seventeenth century.[46] Nor in the beginning was there any requirement that the *conventio* or agreement should be under seal. Indeed the term for years, for the protection of which the action was probably devised, could be created without writing or seal. But before the end of the reign of Edward I a covenant had come to mean a promise in writing under the seal of the covenantor, and the action of covenant lay only for breach of such a promise.[47]

From the ancient precedents in which the judgment required the covenantor to convey or let land pursuant to the terms of his covenant, developed the action of covenant real—a so-called real action.[48] But when the modern action of covenant is spoken of, the personal action is meant, in which the plaintiff may recover damages for the breach of any enforceable promise made by defendant in writing under defendant's seal.

During the thirteenth century the defendant who denied an alleged breach of covenant might wage his law.[49] But this mode of trial in this action did not persist until modern times as it did in debt and detinue; and it seems not to have been used even

[46] Ames, Lectures on Legal History, 152; Anonymous (1585), 3 Leon 119; Stronge v. Watts (1610), 1 Rolle's Abr. 518 (B) 2.

[47] 2 Pollock and Maitland, History of English Law, 219-226.

[48] Maitland, Equity and Forms of Action, 358, 371.

[49] 2 Pollock and Maitland, History of English Law, 634.

in early times when the defendant denied that he had executed the covenant.

Annuity. The writ of annuity, similar in form to that in debt,[50] first appears in the register of writs which Maitland believed to have been compiled in the middle of the reign of Henry III, probably between 1236 and 1259.[51] The medieval lawyers seem to have had some difficulty in handling an annuity which was not a rent, and it was only slowly that it came to be conceived of as a contractual obligation.

After the merely contractual nature of the obligation was realized, the action of annuity gradually fell into disuse. It was occasionally used in the eighteenth century[52] but Mr. Tidd as early as 1803 was able truthfully to say: "This action is at present out of use, being superseded by the action of debt or covenant."[53] Its influence on the later law has been so slight that it merits no further treatment here.

Account. The writ in this action was similar to that in debt and in detinue, and commanded the defendant to render an account to the plaintiff. The first register of writs to contain it is that in which the writ of annuity also makes its original appearance;[54] and the first reported case of its use occurred in 1232.[55] It was probably devised to give the lord of a manor an adequate remedy against his bailiff, who had received rents and made expenditures for him. It lay also at an early date against a factor who had bought and sold goods for his principal, and by one merchant against another with whom he had entered into a joint-adventure. It was extended by statute and judicial decision to require accounting by guardians, executors, administrators, joint-tenants and tenants-in-common; persons whose relationship to the plaintiff required or authorized them to make collections and disbursements on his behalf.

50 Fitzherbert, Natura Brevium, 357.

51 Maitland, History of the Register of Original Writs, 3 Harv. L. Rev. 169, 173, 177.

52 See, *e. g.*, Hope v. Colman (1764), 2 Wils. 221.

53 1 Tidd, Practice of the Court of King's Bench (2 Am. ed.), *4.

54 See note 51, *supra*.

55 2 Pollock and Maitland, History of English Law, 221.

> "Another form of the action of account existed where the defendant was charged simply as a receiver of so much money for the use of the plaintiff by the hands of a third person. Originally that was the only remedy where A delivered money to B for C.[56] . . . The form of the writ against a general receiver charged that money had been received for the use of the plaintiff. Twenty-five cases where that phrase is used, running back to Edward the First and coming down to the last century, have been found."[57]

Here there was no requirement that the receipt by B should have been by authorization of C. All that was necessary was that A should have given and B should have received the money for C's use.

The procedure in account was unusual. The first issue to be tried was whether defendant was under a duty to account to plaintiff. If this was decided in favor of defendant, he was entitled to final judgment; if in favor of plaintiff, the judgment was that defendant do account. Then auditors were appointed before whom the parties must frame their issues and offer their evidence as to the state of accounts between them. If the accounts, when properly submitted and analyzed, showed a balance in plaintiff's favor, he recovered judgment for that balance; if they showed no balance either way or a balance in favor of defendant, the defendant was dismissed with his costs, but he could not get judgment for any sum proved to be due him. Furthermore, the defendant was privileged to wage his law on some issues. This dilatory, cumbersome and expensive method of proceeding caused litigants in later times to resort to the bill in equity for an accounting where the accounts were complicated, and to debt or assumpsit in the simpler cases. For this reason the action of account is rarely found after the beginning of the nineteenth century.[58]

56 Ames, Lectures on Legal History, 117.

57 *Id.* 118.

58 See 2 Pollock and Maitland, History of English Law, 221-222; Maitland, Equity and Forms of Action, 357-358; Ames, Lectures on Legal History, 117-121; 1 Selwyn, Nisi Prius (Am. ed., 1881), 1-9; 1 Tidd, Practice of the Court of King's Bench (2d Am. ed.), 1; Langdell, Brief Survey of Equity Jurisdiction, 74-98; 3 Blackstone, Commentaries (13th ed.), 347-348; 1 Holdsworth, History of English Law (3d ed.), 307-308.

Trespass. Historians do not agree as to the origin of the action; but some things are made clear by authorities now available in print. (1) The writ is not given by Glanvill, nor does it appear in the registers of writs compiled before the reign of Edward I.[59] (2) At the opening of the thirteenth century litigants were bringing appeals for injuries for which in later days they would bring trespass, although in the appeal they could be awarded no compensation but could secure only the punishment of the wrongdoer. (3) In the early years of the reign of Henry III, when writs were being freely manufactured, occasionally trespassory wrongs were remedied by writs issued on the facts of the special case and, after the first third of the thirteenth century, some of these writs very closely resembled the later writs of trespass. (4) Shortly after 1250 the action was in common use; before 1258 the writ was a writ of course. But for some time the limits of the action were not distinctly defined. The word trespass (*transgressio*) had not yet acquired an exclusively technical signification, and many a case of this period, usually classified as trespass, is practically indistinguishable from earlier cases wherein the writs were issued on the special facts thereof. (5) Whatever may have been the source or sources from which it was derived, it came in response to an insistent demand, for the cases show litigants and courts during all the first half of the thirteenth century groping about for such an action.[60]

The jurisdiction of the royal courts was founded upon the fact that the wrong done involved a breach of the king's peace.

[59] Maitland, History of Register of Original Writs, 3 Harv. L. Rev. 213, 217.

[60] See the following cases as illustrative of the assertions in the text. Evesham v. Gifford (1198), 1 Curia Regis Rolls 63 (appeal); Lamburn v. Danmartin (1194), 14 Pipe Roll Soc. 24; Rande v. Malfe (1199), 2 Rot. Cur. Reg. 120 (begun as action for damages: defendant raises issue of title and puts himself on grand assize. Case compromised); Baggetorr v. Morel (1220), Br. N. B. pl. 85; Freston v. Eutropson (1221), *id.* pl. 1520; Stowe v. Mesners (1222), *id.* pl. 194; Iveson v. Bray (1226), *id.* pl. 1735; Abbot of Weybridge v. Gravele (1234), *id.* pl. 835; Teuton v. Chaggeford (1234), *id.* pl. 1121; Beauchamp v. Prior of Kenilworthe (1237), Abbrevio Placitorum 105a; Scroty v. Muncelyn (1241), *id.* 107a; Valence v. Wrennockson (1253), *id.* 129a. By far the most satisfactory account of trespass that has yet appeared is that of Professor George E. Woodbine in 33 Yale Law Journal 799-816, 34 *Id.* 343-370. It was convincing to that distinguished scholar, the late Professor George B. Adams.

The writ and declaration averred that defendant's act had been committed *vi et armis et contra pacem Domini Regis*—with force and arms and against the peace of the Lord King. Originally, it seems reasonable to believe, the force and breach of peace were required to be proved as well as alleged. Such was the case, Professor Maitland thought,[61] in Henry III's day, though even then very slight violence would suffice. In later times neither violence nor breach of the peace had to be proved. In the modern action it was necessary to show only a direct and immediate injury to plaintiff's person or to his corporeal property by the wrongful act of defendant. When brought for injury to plaintiff's person, it was called trespass in assault and battery; for injury to his land, trespass *quare clausum fregit* or *de clauso fracto;* for carrying away his chattels, trespass *de bonis asportatis;* when brought for other wrongs, it was given no special name.

Real property was sufficiently plaintiff's to support the action when he was in possession of it at the time of such injury. His possession, even though unjustifiable as against the true owner, was enough as against others. On the other hand, even if he were the owner and entitled to the immediate possession of the invaded land and yet were out of possession when the injury was inflicted, he could not ordinarily recover in trespass. The landlord of a tenant at will, however, could maintain the action against a stranger for intrusion[62] and against his tenant for waste.[63] From the early part of the fourteenth century a bailor could maintain trespass for such an injury by a stranger to a chattel in the hands of his bailee at will;[64] and at a comparatively early date it became settled that one who owned an interest in, and was entitled to the immediate possession of a chattel was in as good position as the bailor at will. The action did not lie for wrongful invasion of an incorporeal right. Thus, for example, it was

61 Maitland, Equity and Forms of Action, 343-344.

62 Ames, Lectures on Legal History, 228.

63 Anonymous (1587), Savile 84; Tobey v. Webster (1808), 3 Johns. (N. Y.) 461. In the United States a number of jurisdictions held that "where there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass." Gillespie v. Dew, 1 Stew. (Ala. 1827) 229.

64 Ames, Lectures on Legal History, 58.

not maintainable for slander, libel or malicious prosecution or for interference with a franchise or easement.[65]

From the beginning the method of trial was by jury, though a stray case of trial by compurgation has been found.[66] The successful plaintiff recovered damages for the injury, and the defeated defendant was fined or imprisoned. This came to be regarded as a punishment for his breach of the king's peace. As actual breach of the peace ceased to be an element of the action, the fine and imprisonment became obsolete. They were formally done away with in 1694.[67]

Case, or Trespass on the Case. The provisions of Oxford placed an arbitrary limit upon the power of Chancery to create new writs. But legislation could not check the demand for new remedies, and it took less than a generation to demonstrate the inadequacy of existing forms of action to meet the needs of litigants. Accordingly in 1285 the statute of Westminster II provided: "Whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy (*in consimili casu cadente sub eodem jure et simili indigente remedio*) is found none, the clerks of the Chancery shall agree in making the writ; or adjourn the plaintiffs until the next Parliament, and let the cases be written in which they cannot agree, and let them refer them until the next Parliament, and by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants."[68] This enactment authorized Chancery to renew its former practice of issuing writs to fit the facts of the special case, with this limitation, that the new writ must be *in consimili casu* with an existing writ of course. Partly because the word trespass (*transgressio*) had so broad a meaning etymologically and had not yet acquired a technically exact signification, the most

65 But see Y. B. 2 Hen. IV. 11, 48 (1401); Pollock Torts (11 ed.), 380. Trespass for interference with a right of fishery. See also Whittier and Morgan, Cases on Common Law Pleading, 12, note 12. Curiously the action by a master for beating of his servant whereby the master suffered loss of services is trespass. Ditcham v. Bond (1814), 2 Maule & Selwyn 436.

66 2 Pollock and Maitland, History of English Law, 634.

67 Statute 5 and 6 Wm. & M., ch. 12.

68 Maitland, Equity and Forms of Action, 345.

elastic of the formed writs was trespass. Therefore when Chancery issued a writ for a wrong not remediable in any of the established forms of action, it was natural to denominate that wrong a trespass and to describe the writ as one in trespass. Consequently the records and reports during the next hundred years show many writs, classified as trespass, where no violence or breach of the peace is involved and some where neither is even alleged. Gradually the realization came that a new and flexible form of action had been evolved. The line of demarcation between it and trespass was not clear or sharp, but certain procedural differences inevitably developed. If there was no force or breach of the peace, the defendant should not be treated as if he had committed an offense against the king. And by the beginning of the sixteenth century legislators and legal writers, as well as courts and lawyers, recognized that there was a form of action of trespass on the case, or case, distinct from the action of trespass.

As Professor Maitland puts it, case became "a sort of general residuary action."[69] It lay for indirect or consequential injuries to the person, goods or lands of the plaintiff by the wrongful act or neglect of defendant. As the defendant who threw a log against the plaintiff must respond in trespass, so the defendant who wrongfully left a log lying in the highway so that plaintiff stumbled over it was responsible in case. He who maintained a nuisance on his own property to the injury of the health of the plaintiff, his neighbor; he who unjustifiably allowed noxious fumes to escape from his factory and damage plaintiff's trees, shrubbery or growing crops, exposed himself to an action on the case. It was maintainable also for injuries to reversionary interests, such, for example, as the interest of the owner of land in possession of a tenant for years, or that of a bailor of a chattel bailed for a definite term. It could be properly brought too for injuries to incorporeal rights, as, for instance, for wrongful interference with an easement, for libel, slander and malicious prosecution. So general was its application that Stephen went so far as to say that it lay where a party sued for damages for any wrong or cause of complaint to which covenant or trespass would not apply.[70] This statement is probably too broad; but it is doubtless true that the action on the case did make feasible a

69 *Id.* 361.

70 Stephen, Pleading (Williston's ed.), *16, 17.

salutary expansion of the common law. Yet for many years after 1285 the courts seem to have made little, if any, conscious use of the statutory privilege except in allowing new forms of writs of entry.[71]

Assumpsit. Debt, detinue, covenant and account afforded no remedy for breach of an unsealed promise, and there are numerous decisions in the 1400s that no action lies upon such an undertaking.[72] But in the sixteenth century and thereafter actions on the case for broken promises, or actions of assumpsit, are common. How did the change come about? If B cut C with a razor without C's consent, C had an action of trespass against him; if he did it with C's consent for a legitimate purpose, obviously C had no action at all; but if he undertook to shave C skillfully and did the work so carelessly as to cut him, he thereby wrongfully applied physical force directly to C's person. This was exactly the situation where C was entitled to a writ in *consimili casu* with trespass. B was liable in trespass on the case, and it was his undertaking that made him responsible. The writ and declaration therefore alleged that B undertook (*assumpsit*) to do the shaving skillfully.[73] In like manner, where B promised to deal skillfully with C's property and handled it so unskillfully as to injure it, he had to respond in damages in trespass on the case.[74] Again, where a bailee, who had expressly promised to keep the goods entrusted to him with care and skill, negligently or improperly kept them, he was guilty of active interference with the bailor's chattels, analogous to a trespass, and from the latter part of the fifteenth century onward the bailor could secure damages therefor in an action on the case. Here too the bailee's *assumpsit* was a necessary element of bailor's cause. Furthermore, when seller sold goods to buyer with a false express warranty, the courts of the fifteenth century

71 Professor George E. Woodbine of the Yale Law School has made a thorough search of available cases upon this point. He is authority for the statement that the courts seem to have made no conscious use of this statutory provision except in writs of entry for a long period after 1285. The finding of this eminent legal historian is unhesitatingly accepted. But see Ames, Lectures on Legal History, 442.

72 For a full discussion of the history and development of this action, see *Id.* 129-166.

73 *Id.* 130, n. 4.

74 *Id.* 130, notes 1, 3, 5.

looked upon his action not as a breach of contract but as a tort—a deceit. Seller was not violating a promise, he was misrepresenting an existing fact. The sale with a false warranty was active misconduct for which trespass on the case for deceit would lie. Here then were three classes of cases wherein a writ of trespass on the case would issue and wherein breach of the undertaking by affirmative misconduct was of the essence of the action. Now, suppose that S promised to sell to B and, in violation of that promise, sold to C. Was not his sale to C active misconduct in breach of an undertaking? was it not a deceit? and should there not be a remedy against him as against the careless barber, the negligent bailee and the false warrantor? Litigants in the fifteenth century frequently believed so, strongly enough to try it out, and before the opening of the sixteenth century they had convinced the courts that they were right. But one step remained to be taken. In all these cases the promisor's misconduct was positive—a misfeasance. If he merely failed to act, if by nonfeasance he violated his promise, all the earlier cases said no writ could issue. But in view of the facts that the promisor was as blameworthy and the damage to the promisee was as great in one case as in the other, so thin a distinction could not long stand. And early in the sixteenth century it became established that for breach of an unsealed contract an action on the case would lie.[75] This action later split off from Case and became a separate formed action known as Assumpsit.[76]

For the breach of an unsealed promise the lawyers now had a formed action in which trial was by jury. They had before this come to realize that wager of law often afforded a dishonest defendant in the action of debt the means of evading a just obligation; and they were anxious to make this new action do the work of debt. However, assumpsit could not be brought upon the promise which created the debt, because that promise operated as a grant, and a formed action providing an adequate remedy made resort to an action on the case unnecessary. By the middle of the sixteenth century, however, if a debtor made a subsequent promise to pay the debt, assumpsit would lie upon that promise. In 1602 the question whether such a second promise was necessary was twice argued before all the Justices of England and

[75] *Id.* 139-143.

[76] Maitland, Equity and Forms of Action, 363.

Barons of the Exchequer.[77] The jury in an action of assumpsit found in a special verdict that there was a bargain and sale, "that between the plaintiff and the defendant there was no other promise or assumption but only the said bargain." The defendant argued (1) that plaintiff's remedy was debt, "which is an action formed in the Register, and therefore he should not have an action on the case, which is an extraordinary action, and not limited within any certain form in the Register"; (2) that to allow assumpsit would take away from defendant the benefit of wager of law "and so bereaves him of the benefit which the law gives him, which is his birthright." The Justices and Barons held that the action was properly brought. "It was resolved, that every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay, or deliver it, and therefore when one sells any goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt. . . . It was said, that an action on the case on *assumpsit* is as well a formed action, and contained in the register, as an action of debt, for there is its form; also it appears in divers other cases in the register, that an action on the case will lie, although the plaintiff may have another formed action in the Register." Thereafter assumpsit lay to recover a simple contract debt.

For a long time the common law provided no remedy for the person who parted with his goods or rendered services to another under the reasonable expectation of receiving from him their reasonable value. Though the recipient by his conduct created in the other party the reasonable belief that he would pay what the goods or services were worth, that other could not bring debt because the sum was not fixed, nor assumpsit because there was no express promise. In the early part of the seventeenth century the courts took the reasonable step of construing the recipient's conduct as a promise to pay and allowing assumpsit to be brought for breach of this promise.[78] It was said that the law implied the promise.

77 Slade's Case, 4 Coke 92 b.

78 Ames, Lectures on Legal History, 154-159.

Between the years 1673 and 1705, by this device of implying promises, assumpsit was made available for the enforcement of quasi-contractual obligations. That is to say, wherever in the opinion of the courts, the law created an obligation on the part of defendant to pay money to plaintiff, the latter might maintain assumpsit. The declaration contained an allegation of a promise by defendant to pay, but no proof of it was required.[79]

When the action was brought for the breach of an express promise, it was called Special Assumpsit; when brought to collect a simple contract debt, or for the reasonable value of goods or services, or to enforce a quasi-contractual obligation, it was called General or Indebitatus Assumpsit.

Trover. Replevin, detinue and trespass *de bonis asportatis* did not, separately or in combination, furnish adequate relief for wrongful dealing with chattels. Replevin lay only for a wrongful taking. Trespass gave no remedy for damage or tortious transfer by the bailee of the bailed goods.[80] Detinue had at least two serious defects: (1) The defendant had the privilege of waging his law. (2) He had the option of returning the chattel or paying its assessed value; and if the chattel were damaged, he was likely to return it. At the very least, an action of trespass in *consilimi casu* with detinue was needed, and to meet this need the action of trover was developed. It began to emerge as an action separate from trespass on the case about the middle of the sixteenth century. It lay, like *detinue sur trover*, upon a finding by defendant and a refusal by him to deliver to the plaintiff. Its elements are well stated in the following quotation:

> "The classic count in trover alleges (1) that the plaintiff was possessed, as of his own property, of a certain chattel; (2) that he afterwards casually lost it; (3) that it came to the possession of the defendant by finding; (4) that the defendant refused to deliver it to the plaintiff on request; and (5) that he converted it to his own use, to the plaintiff's damage." [81]

[79] *Id.* 160-166.

[80] But it seems that trespass lay against a bailee who destroyed the goods.

[81] Ames, History of Trover, 11 Harv. L. Rev. 277. A full account of the history and development of this action is found in this article 11 *id.* 277-289, 374-386.

No doubt each of these allegations was originally required to be proved as alleged. But as time went on, the scope of the action was expanded to meet new situations. Allegations once regarded as matter of substance were later held to be mere matter of form. The losing and finding need not be proved. In England the only property in the chattel which plaintiff must show was possession or right to immediate possession, but in some American jurisdictions a possession by plaintiff not under the true owner was not sufficient. In the usual case demand and refusal were not part of plaintiff's case. And if defendant exercised dominion over the chattel for the purpose of destroying it or devoting it to the use of a stranger, to the exclusion of the plaintiff, he was just as responsible in trover as if he had exercised such dominion for his own use and benefit. Thus of the five allegations plaintiff must generally prove none literally; he must make a qualified showing of the first and last.

Ejectment. In the last years of the twelfth century and the first third of the thirteenth century a lessee for years who was wrongfully ejected by his lessor might bring an action of covenant and secure damages for the ouster and restoration of his term. But as against others than his lessor he had no remedy. William Raleigh, a royal justice whose judicial career ended in 1239,[82] is credited with having invented a writ which Bracton believed ought to give the termor the same relief against other ejectors as covenant gave against the lessor.[83] But it soon became established that this writ *quare ejecit infra terminum* was available only against an ejector who was claiming under the termor's lessor. Now, while a termor had not that sort of possession which the medieval courts called seisin, yet he had sufficient possession to maintain an action of trespass *quare clausum fregit* against strangers who intruded and, before the end of the fifteenth century, even against his lessor who wrongfully entered. The writ of trespass *de ejectione firmae* required the defendant to answer why with force and arms and against the peace he had entered the land and ejected the plaintiff. As in other actions of trespass, the plaintiff could recover only damages. During the fifteenth century efforts were made to expand the action, so that

82 Maitland, History of Register of Original Writs, 3 Harv. L. Rev. 175.
83 Bracton, De Legibus et Consuetudinibus Angliae, folio 220.

the termor might have against strangers who ejected him as adequate a remedy as he had under covenant and *quare ejecit* against his lessor and those claiming under the lessor. And before the beginning of the sixteenth century it was finally settled that though neither the writ nor the declaration contemplated such relief, the court would award the successful plaintiff restoration of his term and order the sheriff to put him back in possession.[84]

Obviously the plaintiff would not be entitled to be repossessed of the land unless his lessor had a sufficient title to support the lease. Consequently, if defendant denied the lessor's title, plaintiff would have to establish it. The result was that in a personal action title to real estate was incidentally tried. Herein the lawyers saw an opportunity to secure the trial of title to realty without the expense and delay of the old real actions and to secure repossession without risk of the narrow technicalities of the possessory assizes. To enable the claimant out of possession to try out his title and right to immediate possession of land in the occupancy of another it was necessary only to put him in the position of a lessor. Accordingly the following procedure was followed. The claimant C entered upon the land and then and there delivered to a friend L, a lease for years, and left L upon the premises. L remained there until O, the occupant, appeared and ejected him. L thereafter brought trespass *de ejectione firmae* against O. He could readily prove C's entry upon the land, the lease then and there delivered to L by C and the ejectment of L by O, and the only real issue was C's title. If L won, he was put in possession of the land, and later surrendered it to C. Because it was frequently inconvenient or dangerous for L to remain upon the premises until O appeared and threw him off, it became customary for C to take with him not only L but E. As soon as C had delivered the lease to L and left him in possession, E would eject him. L would then bring his action against E, the casual ejector. By this device L might get judgment for repossession without O's having any knowledge of the action or opportunity to resist C's claim. To avoid this outrageous result, the court required O to be given notice and opportunity to defend.

Although the entry by C, his lease to L, and L's ejectment by

[84] Maitland, Equity and Forms of Action, 350.

E were mere formalities and had nothing to do with the real question at issue, they had to be proved if denied; and since they had to be proved, it was essential that they should have actually happened. Under Chief Justice Rolle (1649-1660) this useless performance was made unnecessary. C made no entry and executed no lease to L, and E did no ejecting. C, in the name of L, made his declaration in ejectment against E in the usual form, and to it he appended a notice directed to O and signed in E's name, informing O of the pendency of the action, stating that E had no title and intended to make no defense and telling O to apply to the court for permission to defend. The declaration and notice were delivered to O. If he did not apply for leave to defend, judgment went against E by default, and C was put in possession. If O did apply for leave to defend, it was granted to him only upon condition that he admit the entry by C,[85] the lease to L and the ouster of L by E, and take issue only upon the title of C. Later L and E came to be only fictitious persons, the familiar John Doe and Richard Roe or the suggestive John Fairclaim and Richard Shamtitle. And so the action remained until modern times. At present all its fictions have been done away with by legislation, and C may bring a direct action against O.[86]

The action lies only by a plaintiff out of possession against a defendant in possession. It does not lie by a plaintiff out of possession against the lessor of a tenant in possession to determine whether plaintiff is entitled to receive the rent under the lease;[87] nor against any other defendant out of possession.[88] Consequently it lies only for corporeal realty and not for such intangible interests as easements.[89] Although it is frequently said that plaintiff must recover upon the strength of his own title and not on the weakness of his adversary's, the prevailing view is that mere prior possession is sufficient against a mere wrongdoer.[90]

85 Perry, Common Law Pleading, 98, n. 1.

86 See Maitland, Equity and Forms of Action, 347-355; Perry, Common Law Pleading, 93-99; 3 Blackstone Commentaries (13 ed.), 199.

87 Doe v. Wharton (1798), 8 Term Rep. 2.

88 Goodright v. Rich (1797), 7 Durn. & E. 327, Whittier & Morgan, Cases on Common Law Pleading 59 and note 16.

89 Smith v. Wiggin (1868), 48 N. H. 105.

90 Casey v. Kimmel (1899), 181 Ill. 154, 54 N. E. 905, Whittier & Morgan, Cases on Common Law Pleading 55 and note 10.

CHAPTER VI

PLEADINGS

At Law

In General. After plaintiff had chosen his writ and corresponding form of action, and the defendant had appeared in response to the summons in the writ, it was necessary to make known to the court the exact point in controversy between them. Originally this was accomplished by having the plaintiff first state his claim orally in open court and requiring the defendant to respond thereto. Defendant's response might be that plaintiff's statement was insufficient in law, in which case he was said to demur, or it might consist of a denial of plaintiff's statement, or of an admission of its truth and an allegation of other facts which, so defendant contended, made plaintiff's claim against him invalid or unenforceable. To such allegation of new facts plaintiff had to demur or to reply on the facts; and each party had to meet the statement of the opposing party by a demurrer, which always raised an issue of law, or by a counter-statement of facts until an issue of fact was raised. These statements and counter-statements or responses were called the pleadings and the rules governing them, rules of pleading. Plaintiff's first pleading was known as the Declaration; on the facts this was met by defendant's Plea; the Plea by plaintiff's Replication; the Replication by defendant's Rejoinder; the Rejoinder by plaintiff's Surrejoinder; the Surrejoinder by defendant's Rebutter; the Rebutter by plaintiff's Surrebutter. If further pleadings were required, they were nameless. As the pleaders stated their respective contentions, those officials whose duty it was to make a record of the proceedings reduced the substance of the pleadings to writing. Naturally they spoke of the parties in the third person and as presently acting. In the course of time most, if not all, pleadings were required to be written, and it seems reasonable to suppose that the usual form of the record was naturally adopted. This may account for the person and tense in which allegations are now customarily phrased as well

as the form in which most pleadings are cast. At present in civil actions all pleadings are usually in writing. In many jurisdictions in the United States their names have been changed. The Declaration is frequently called Complaint, sometimes Narratio, sometimes Petition, sometimes Statement of Claim; the Plea is called Answer; the Replication, Reply. In many states, there is no pleading on the facts after the Reply, and in a few none after the Answer in the ordinary case. Under the common law system, whenever one party demurred to the pleading of another, the other had to join in demurrer, that is, assert that his pleading was sufficient in law. This raised a question for decision by the court. Whenever one party met the other's pleading by a denial and put himself upon the country, the latter, if he did not demur, had to interpose a joinder of issue or a *similiter*. This merely said that he too put himself on the country. It raised an issue of fact to be tried by the jury. Under modern codes, the joinder in demurrer and the joinder of issue or *similiter* are never used. The following outlines and examples, which do not include joinder in demurrer or joinder of issue, will give an idea of the function and content of the various pleadings sufficient for an understanding of the usual reported case.

OUTLINE AND EXAMPLES OF PLEADINGS

Declaration (Complaint, Narratio, Petition). A written statement of facts by plaintiff, which, as plaintiff contends, constitute a cause of action in his favor against defendant.

EXAMPLES—DECLARATION FOR TRESPASS TO REALTY

England—In the King's Bench.

The ..... day of January A.D. 19.. Middlesex, to wit. Samuel Student, by his attorney, Lewis Lawyer, complains of Peter Policeman, who has been summoned to answer the plaintiff in an action of trespass. For that the defendant on the .... day of January in the year of our Lord 19.., with force and arms broke and entered a certain dwelling-house of the plaintiff situate and being in the parish of X in the County of Y, and then made a great noise and disturbance therein, and then ejected, expelled, put out and

amoved the plaintiff and his family from the possession, use, occupation and enjoyment of the said dwelling-house and kept and continued them so ejected, expelled, put out and amoved for a long space of time, to wit, from thence hitherto; whereby the plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said dwelling-house. And other wrongs to the plaintiff then did, against the peace of our lord the now King and to the damage of the plaintiff of £100, and thereupon he brings suit, etc.[1]

Connecticut—[N.B. In Connecticut the complaint is usually incorporated in the writ of summons and has no separate caption. See Chapter IV.]

1. The plaintiff before and at the time of the grievances hereinafter complained of, was a boarding-house keeper, carrying on business at the house known as No. 73 Chestnut Street, in Bridgeport, then occupied by the plaintiff.

2. On January 1st, 19.., the defendant, with other men acting under his orders, broke into said house, and forcibly thrust the plaintiff therefrom.

3. The defendant then took possession of said house, and has kept the plaintiff out of the possession thereof from thence to the present time.

4. The business of the plaintiff as a boarding-house keeper was destroyed by the acts of the defendant hereinbefore stated.

5. The plaintiff has suffered $200 damage thereby. The plaintiff claims $200 damages.[2]

The declaration is to be met by one of the following:

A. General Demurrer. A statement, usually in writing, by defendant that plaintiff's declaration is insufficient in law, that is, that the facts alleged therein do not constitute a cause of action in favor of plaintiff against defendant.

[1] See 2 Chitty on Pleading (7th ed., 1844), 658. All references herein are to this edition. The forms given are not of the present practice, but of the system upon which our non-code practice was builded.

[2] See Connecticut Practice Book (1908), 423.

EXAMPLES

England—In the King's Bench.

The .... day of January, 19...

Samuel Student
vs.
Peter Policeman

The defendant by his attorney Arthur Andrew says that the declaration is not sufficient in law.[3]

Minnesota.

State of Minnesota — District Court
County of St. Louis — Eleventh Judicial District

Samuel Student, Plaintiff
vs.
Peter Policeman, Defendant
} Demurrer

Comes now defendant and demurs to the complaint of the plaintiff on the ground that it fails to state facts sufficient to constitute a cause of action.

(N.B. In most code states the demurrer must specify the grounds of demurrer; but a demurrer specifying insufficient facts is usually termed a general demurrer.)

Connecticut.

Superior Court
Fairfield County

January ...., 19...

Samuel Student
vs.
Peter Policeman
} Demurrer

The defendant demurs to the complaint because it does not aver that the plaintiff was in possession of the premises known as No. 73 Chestnut Street in Bridgeport on January 1st, 19.., at the time of the grievances complained of in said complaint.

(N.B. In Connecticut by statute all demurrers must distinctly specify the reasons why the pleading demurred to is insufficient.)

[3] 3 Chitty on Pleading, 534.

B. Special Demurrer. A statement, usually in writing, by defendant that plaintiff's declaration is insufficient in substance in failing to state facts sufficient to constitute a cause of action, and insufficient in form in certain designated particulars.

EXAMPLES

England—(Title as in General Demurrer).

The defendant by his attorney, Arthur Andrew, says that the declaration is not sufficient in law. And the defendant according to the form of the statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the said declaration, that is to say, for that the said close and dwelling-house, in which, etc., in the declaration mentioned are not designated or described in the said declaration either by name or abuttals or other description; and also for that it does not appear in or by said declaration where or in what parish or part of the said county the said close and dwelling-house in which, etc., were or are situate. And also that the declaration is in other respects uncertain, informal and insufficient.[4]

(N.B. In most code states, the grounds for demurrer are specifically enumerated in the statutes; and mere matter of form is usually not one of them.)

C. Plea of General Traverse or General Issue. A written statement by defendant in effect denying all the material allegations in plaintiff's declaration. In the different forms of action, it is expressed in different phraseology. In Trespass and Case, it is Not Guilty; in Assumpsit, Non-assumpsit; in Debt, Nil debet. Non cepit and Non detinet in Replevin, and Non est factum in Covenant are usually called pleas of general issue, but they are hardly broad enough to fit the above definition.

EXAMPLES

England—(Same title as in General Demurrer above).

And the defendant by his attorney, Arthur Andrew, says that he is not guilty of the said alleged trespasses above laid to his charge, or of any or either of them, or any part thereof, in manner and form as the plaintiff hath above

[4] 3 Chitty on Pleading, 534.

thereof complained against him. And of this the defendant puts himself upon the country, etc.[5]

D. Plea of Common Traverse or Specific Traverse. A written statement expressly denying a material allegation of plaintiff's declaration, usually in the terms of the allegation. After the rule became established that the denial of any allegation of a declaration which might be put in issue by the general issue could not properly be made specially, there was no room for a plea of common traverse in Trespass. So no example of such a plea to the declaration above set out can be given.

EXAMPLE

Covenant; Common Traverse of breach for not repairing.

(Title as in General Demurrer above.)

The defendant, by Arthur Andrew, his attorney, says that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay, or out of repair, in manner and form as the plaintiff hath above complained against him, the defendant. And of this he puts himself upon the country.[6]

E. Plea of Special Traverse. A written statement denying in an argumentative manner a material allegation of plaintiff's declaration followed by a direct denial of the same allegation. The direct denial is introduced by the phrase *absque hoc* (without this), or the phrase *et non* (and not). Like the common traverse it could not properly be used as a plea to a declaration in Trespass.

EXAMPLE

Special Traverse in Replevin—Property in Third Person.

(Title as in General Demurrer.)

And the defendant by Arthur Andrew, his attorney, says that the goods and chattels in the said declaration mentioned at the said time when, etc., were the property of one William Smith (*absque hoc* that they were the property of plaintiff, or) and not of the plaintiff, as by the said declaration is

5 *Id.* 312.

6 Stephen, Pleading (Williston's ed.), *58.

above alleged. And this the defendant is ready to verify; wherefore he prays a return of the said goods and chattels together with his costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, etc.[7]

(N.B. After the Hilary Rules of 1834 the defendant put himself on the country instead of offering to verify.)

F. Answer or Defense of General Denial. A written statement of defendant denying each and every allegation of plaintiff's complaint. This was not known to the common law system; it is provided for by statute and applies to all forms of action.

EXAMPLES

Connecticut—(Title as in Connecticut General Demurrer above, substituting "Answer" for Demurrer.)

The defendant denies the truth of the matters contained in the plaintiff's complaint.

Minnesota—(Title as in Minnesota Demurrer above, substituting "Answer" for "Demurrer.")

Comes now the defendant and for answer to the complaint of the plaintiff denies each and every allegation in said complaint contained.

New York—Similar to Minnesota.

G. Answer or Defense of Specific Denial. A written statement denying specifically one or more allegations of the complaint. To make the answer sufficient these denials must put in issue allegations necessary to plaintiff's cause of action.

EXAMPLES

Connecticut—To the Connecticut Complaint above. (Title as in Connecticut General Demurrer above, substituting "Answer" for "Demurrer.")

Paragraphs second, third, fourth and fifth are denied.

or

1. Paragraph first is admitted.
2. Paragraph second is denied.

[7] See 3 Chitty on Pleading, 292.

New York.

Supreme Court of New York
County of New York

Samuel Student, Plaintiff
vs.
Peter Policeman, Defendant
} Answer

Comes now defendant in the above-entitled action and for answer to the complaint of the plaintiff denies each and every allegation contained in paragraph numbered three thereof.

or

Comes now defendant and for answer to the complaint denies specifically that at the time of the grievances alleged in said complaint plaintiff was in occupation of the house known as No. 73 Chestnut Street in Bridgeport, and denies specifically that this defendant then or at any other time broke into said house or thrust the plaintiff therefrom.

H. Plea or Defense in Confession and Avoidance. A written statement by defendant admitting, either expressly or by failure to deny, the truth of the facts stated by plaintiff in his declaration, and setting up additional facts, which, as defendant contends, constitute an excuse or justification for the alleged wrong complained of by plaintiff, or a discharge of defendant from all liability therefor. In code states this is called an answer or defense of new matter, or special defense.

EXAMPLES

England—Liberum Tenementum—His own freehold. (Title as in General Demurrer above.)

And the defendant by Arthur Andrew, his attorney, says that the said dwelling-house in the said declaration mentioned, and in which, etc., now is, and at the said several times when, etc., was the dwelling-house and freehold of the said Peter Policeman, the defendant herein; wherefore the defendant in his own right at the said several times when, etc., committed the said several alleged trespasses in the said declaration mentioned, in the said dwelling-house, in which, etc., so being the dwelling-house and freehold of defendant,

as he lawfully might for the cause aforesaid, which are the said several alleged trespasses whereof the plaintiff hath above thereof complained against him. And this the defendant is ready to verify, etc.[8]

Connecticut—Accord and Satisfaction. (Title as in Connecticut Answer of General Denial.)

After committing the said supposed grievances in the complaint mentioned and before this action, on February 15, 19.., the defendant delivered to the plaintiff, and the plaintiff accepted and received from the defendant ten shares of stock of the X Y Corporation in full satisfaction of the damages in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the acts therein alleged.

A Plea in Confession and Avoidance is to be met by one of the following:

1. *General Demurrer*—A statement, usually in writing, by plaintiff that the defendant's plea is insufficient in law; that is, that the facts set up therein do not constitute a defense to the cause of action alleged in plaintiff's declaration.

The form is similar to that of a general demurrer to the declaration.

2. *Special Demurrer*—A statement, usually in writing, by plaintiff that the defendant's plea is insufficient in law, that is, that defendant's plea does not allege facts constituting a defense to the cause of action set forth in plaintiff's declaration, and that it is defective in form in certain designated particulars.

(In most code states there is no demurrer for mere defect of form.)

EXAMPLE

England—(Same title as for Demurrer to Declaration).

The plaintiff by Lewis Lawyer, his attorney, says that the plea is not sufficient in law. And the plaintiff according to the form of the statute in such case made and provided, states and shows to the Court here the following causes of

[8] 3 Chitty on Pleading, 360.

demurrer to the said plea, that is to say, that the said plea amounts to the general issue.

3. *Replication by way of General Traverse*—Such a general traverse in pleadings subsequent to the Plea was not generally allowed at common law. In actions of Trespass, Case, Assumpsit, Debt, Covenant, and Replevin, it was permitted in general where the defendant's plea admitted the plaintiff's right and set up an excuse or justification for defendant's infringement thereof. It was called the *Replication de Injuria.* It was not proper in trespass to a plea of liberum tenementum, nor was it proper to a plea of discharge. Consequently no example of such a replication to the pleas above set out can be given.

EXAMPLE

Replication de Injuria to Plea of Self-Defense in Trespass to Person.

England—(Title same as in General Demurrer above).

And the plaintiff, as to the plea of the defendant by him above pleaded, says that the defendant at the said time when, etc. (*de injuria sua propria absque tali causa*) of his own wrong, and without the cause by him in his plea alleged, committed the said several trespasses in the introductory part of said plea mentioned, in manner and form as the plaintiff hath above in his said declaration complained against the defendant. And this the plaintiff prays may be inquired of by the country.[9]

4. *Reply of General Denial*—In code states such a reply is common. It denies all the allegations of defendant's answer setting up an affirmative defense.

EXAMPLE

Connecticut—(Title as in Connecticut General Demurrer above, substituting "Reply" for "Demurrer").

The plaintiff denies every allegation in the answer.

5. *Replication of Common Traverse or Specific Traverse*—A written statement by plaintiff denying the truth of one

9 3 Chitty on Pleading, 489.

or more of the material allegations of the plea. At common law plaintiff was usually required so to confine his denial as to put in issue only a single material fact.

EXAMPLE

England—Traversing plea of liberum tenementum. (Title as in the General Demurrer above.)

And the plaintiff, as to the plea of the defendant by him above pleaded, saith that the said dwelling-house in the said declaration mentioned in which, etc., now is not, and at the same several times when, etc., was not the dwelling-house and freehold of the defendant in manner and form as the defendant hath above in his said plea alleged. And this the plaintiff prays may be inquired of by the country, etc.[10]

6. *Replication of Special Traverse*—A written statement denying in an argumentative manner a material allegation of defendant's plea followed by a direct denial, usually introduced by *absque hoc* or *et non.*

EXAMPLE

England—Traversing plea of liberum tenementum. (Title as in the General Demurrer above.)

And the plaintiff, as to the plea of the defendant by him above pleaded, says that the said dwelling-house in the said declaration mentioned, in which, etc., now is, and at the said several times when, etc., was the dwelling-house and freehold of the plaintiff [*absque hoc* that it now is, and at the said several times when, etc., was, or] and not the dwelling-house and freehold of the defendant, in manner and form as the defendant hath in his said plea alleged. And this the plaintiff prays may be inquired of by the country, etc.[11]

7. *Reply of Specific Denial*—A written statement denying one or more of the allegations of defendant's answer.

10 *Id.* 495-496.
11 3 Chitty on Pleading, 495.

EXAMPLE

Connecticut—(Title as in Reply of General Denial).

The plaintiff denies the second paragraph of the answer.

8. *Replication or Reply in Confession and Avoidance*—A written statement admitting, either expressly or by failure to deny, the truth of the facts set up by defendant by way of excuse, justification or discharge, and alleging facts, which, as plaintiff contends, avoid such excuse, justification or discharge.

EXAMPLES

England—To the plea of liberum tenementum. (Title as in General Demurrer above.)

And the plaintiff, as to the plea of the defendant by him above pleaded, says that while the said dwelling-house was the dwelling-house and freehold of the defendant, and before the said time when, etc., to wit on the .... day of January, 19.. (the date of the demise) the defendant demised the said dwelling-house with the appurtenances to the plaintiff, to have and to hold the same to the plaintiff, for and during and unto the full end and term of one year from thence next ensuing, and fully to be complete and ended, and so on from year to year, for so long time as they the plaintiff and defendant should respectively please, by virtue of which said demise the plaintiff afterwards, and before the said time when, etc., entered into the said dwelling-house and became and was possessed thereof, and continued so thereof possessed, from thence until the defendant afterward, and during the continuance of the said demise, to wit, at the said time when, etc., of his own wrong, broke and entered the said dwelling-house and committed the said several trespasses in the said plea mentioned, in manner and form as the plaintiff hath above thereof complained against the defendant. And this the plaintiff is ready to verify, etc.[12]

Connecticut—Reply of Fraud to Defense of Release. (Title as in Reply of General Denial.)

1. On February 15, 19.., the plaintiff, then being the owner of ten shares of stock in the X Y Corporation, did

[12] 3 Chitty on Pleading, 496.

with intent to deceive and defraud the defendant, falsely and fraudulently represent to him that the X Y Corporation was the owner of assets worth $1,000,000 in excess of all its liabilities, that it was a going concern and was doing an extensive and active business in the manufacture and sale of drugs.

2. Defendant relying on said representations, accepted said ten shares of stock in full satisfaction of the damages in the complaint mentioned.

3. Said representations were false, said X Y Corporation was not the owner of assets worth $1,000,000 in excess of its liabilities, it was not a going concern, doing an extensive business in the manufacture and sale of drugs; on the contrary said X Y Corporation was totally insolvent and had ceased to do any active business and was in the course of being wound up, and said ten shares of stock were and are worthless.

4. Immediately on discovering said fraud, defendant tendered to plaintiff said ten shares of stock but plaintiff refused to accept them.

A Replication in Confession and Avoidance is to be met by one of the following:

1. General Demurrer—Similar to general demurrer to plea.

2. Special Demurrer—Similar to special demurrer to plea.

3. Rejoinder of Common or Specific Traverse—Similar to replication of common or specific traverse.

4. Rejoinder of Special Traverse—Similar to replication of special traverse.

5. Rejoinder of General Denial—Where under the codes a rejoinder is permitted, it may put in issue all the facts alleged in the reply or replication. At common law a general traverse was not permitted in a rejoinder or any pleading subsequent thereto.

6. Rejoinder of Specific Denial—Similar to a reply of specific denial.

7. Rejoinder in Confession and Avoidance—Similar to replication in confession and avoidance.

EXAMPLE

England—Rejoinder to Replication of demise. (Title as in General Demurrer.)

And the defendant, as to the replication of the plaintiff to the said plea of the defendant says, that the defendant, after the making of the said demise in the said replication mentioned, and while the plaintiff was possessed of the said dwelling-house in which, etc., under and by virtue of the said demise, as tenant thereof to the defendant, and half a year before the .... day of January, 19.., to wit, on the .... day of July, 19.., gave due notice to and then required the plaintiff to quit and deliver up the possession of the said demised dwelling-house, with the appurtenances, unto the defendant on the said .... day of January, A.D. 19.., then next following; and by means thereof, afterwards, and before the said time when, etc., to wit, on the day and year last aforesaid, the said tenancy, and the estate and interest of the plaintiff in the said demised dwelling-house, and the said place in which, etc., with the appurtenances, wholly ended and determined; and thereupon the defendant, after the said tenancy was so ended and determined as aforesaid, to wit, at the said several times when, etc., entered into the said dwelling-house in which, etc., and committed the said alleged trespass in the said plea mentioned, as he lawfully might for the cause aforesaid. And this the defendant is ready to verify, etc.[13]

A Rejoinder in Confession and Avoidance is to be met by one of the following:

1. General Demurrer.
2. Special Demurrer.
3. Surrejoinder of Common or Specific Traverse.
4. Surrejoinder of Special Traverse.
5. Surrejoinder of General Denial (where permitted by codes).
6. Surrejoinder of Specific Denial (where permitted by codes).
7. Surrejoinder in Confession and Avoidance.

[13] 3 Chitty on Pleading, 519.

EXAMPLE

England—Surrejoinder of Waiver of Notice to Rejoinder or Notice to Quit. (Title as in General Demurrer).

And the plaintiff, as to the rejoinder of the defendant to the replication of the plaintiff to the said plea of the defendant says that after the giving of the said notice in the said rejoinder mentioned, and before the expiration of the said tenancy, to wit on the 15th day of September, 19.., the defendant waived, relinquished and abandoned the said notice, and then assented and agreed with the plaintiff to the continuance of the said tenancy in the said replication mentioned, and the said tenancy did continue from thenceforth until and at and after the said time when, etc. And this the plaintiff is ready to verify, etc.[14]

A Surrejoinder in Confession and Avoidance is to be met by one of the following:

1. General Demurrer.
2. Special Demurrer.
3. Rebutter of Common or Specific Traverse.
4. Rebutter of Special Traverse.
5. Rebutter of General Denial (where permitted by codes).
6. Rebutter of Specific Denial (where permitted by codes).
7. Rebutter in Confession and Avoidance.

EXAMPLE

England—Rebutter of fraud in obtaining the waiver. (Title as in General Demurrer.)

And the defendant, as to the surrejoinder of the plaintiff to the rejoinder of the defendant to the replication of the plaintiff to the plea of the defendant, says that the plaintiff caused and procured the defendant to waive, relinquish and abandon the said notice in said rejoinder mentioned and to assent and agree with the plaintiff to the continuance of said tenancy in said replication mentioned through and by means of the fraud, covin and misrepresentations of the

[14] 3 Chitty on Pleading, 522.

plaintiff.[15] And the defendant further says that he, the defendant, within a reasonable time next after said fraud, covin and misrepresentation came to his knowledge, to wit, on the 20th day of September, 19.., rescinded and abandoned his said waiver, relinquishment, assent and agreement, and so notified said plaintiff on said 20th day of September, 19... And this the defendant is ready to verify.

A Rebutter in Confession and Avoidance is to be met by one of the following:

1. General Demurrer.
2. Special Demurrer.
3. Surrebutter of Common or Specific Traverse.
4. Surrebutter of Special Traverse.
5. Surrebutter of General Denial (where permitted by codes).
6. Surrebutter of Specific Denial (where permitted by codes).
7. Surrebutter in Confession and Avoidance.

It is conceivable that the rebutter alleging fraud in the procurement of the waiver of notice to quit might be met by a surrebutter of affirmance of the original waiver or of waiver of the fraud after discovery of the fraud. If so it would be met by a nameless pleading. In order to close the pleadings in the English trespass case of which the previous pleadings have been given, there follow a surrebutter of common traverse, and a similiter.

SURREBUTTER

England—(Title as in General Demurrer).

And the plaintiff, as to the rebutter of the defendant to the surrejoinder of the plaintiff to the rejoinder of the defendant to the replication of the plaintiff to the plea of the defendant, says that he the plaintiff did not cause or procure the defendant to waive, relinquish or abandon the said notice in the said rejoinder mentioned or to assent or agree to the continuance of said tenancy in the said replica-

[15] *Id.* 34, gives this allegation. It would not be sufficient in modern code pleading, though usual at common law.

tion mentioned through or by means of the fraud, covin or misrepresentations of the plaintiff, in manner and form as in said rebutter is alleged. And of this the plaintiff puts himself upon the country, etc.[16]

SIMILITER

England—(Title as in General Demurrer).

And the defendant as to the said surrebutter of the plaintiff, and whereof he hath put himself upon the country, doth the like.[17]

IN EQUITY

Generally. In the beginnings of equity in England, the pleadings were exceedingly simple and informal. By a process of gradual degeneration they became highly complex, artificial and technical. Mr. Justice Story's comment upon the bill in equity might fairly be applied to the whole system of equity pleading:

> "The ability to understand what is the appropriate remedy and relief for the case; to shape the bill fully, accurately, and neatly, without deforming it by loose and immaterial allegations, or loading it with superfluous details; and to decide who are the proper and necessary parties to the suit;—the ability to do all this requires various talents, vast learning, and a clearness and acuteness of perception, which belongs only to very gifted minds."[18]

Consequently, it would serve no useful purpose to attempt to carry a neophyte through the subtle mazes of a series of technical documents which would make the intricacies of common law pleading seem like a first lesson in simple arithmetic. A bare outline must suffice. The suit was instituted by filing a petition, called a bill, setting forth the petitioner's grievances and praying the chancellor to compel defendant to respond thereto, and to award petitioner the proper relief. Originally defendant, when ordered by subpoena to respond, could attack the sufficiency of the bill, or set up facts in opposition or

16 See 3 Chitty on Pleading, 522.
17 *Id.* 523.
18 Story, Equity Pleading (10th ed.) sec. 13.

avoidance; and the course of pleading was much the same as at common law. Later, however, plaintiff's pleadings were the bill and replication; defendant's were demurrer, disclaimer, plea or answer.

Bill in Equity. The classic bill consisted of nine parts. (1) Direction or address to the court. (2) Introduction, giving the name of the plaintiff and description of the capacity in which he appeared. (3) Premises or stating part, in which plaintiff narrated the facts and circumstance of his case, setting forth every material fact as to which he proposed to offer evidence. (4) Confederating part, in which plaintiff charged defendant with conspiring with others to injure and defraud the plaintiff. (5) Charging part, in which plaintiff set up that defendant was or might be relying upon specified pretended defenses, and alleged facts to destroy them. (These allegations were usually inserted as a basis for discovery of the nature of defendant's case, and often served the purpose which the replication and surrejoinder would have served under the earlier system.) (6) Jurisdiction clause, in which plaintiff alleged defendant's acts to be contrary to equity, and asserted that he had no adequate remedy at law. (7) Interrogatory part, in which plaintiff prayed that defendant be required to answer specific questions, each of which was set out in detail and had to be based upon some allegation previously made in the bill. (8) Prayer for relief, in which plaintiff asked for the specific relief which he desired and also for such relief as the court should deem meet. (9) Prayer for process, in which plaintiff prayed that defendant be compelled to appear and answer and to abide the decree of the court.

Demurrer, General. Defendant might challenge the sufficiency of the whole bill by a general demurrer. In this he protested that the allegations of the bill were in no wise true, but averred that, even if they were true, they could not serve as the basis for any decree by the court, and prayed judgment whether he ought to answer further.

Demurrer, Special. This was interposed to the whole bill for defect in the form or frame of the bill.

Demurrer, Partial. The defendant might for any substantial cause demur to any part of a bill, the allegations of which were separable from the rest and, standing alone, constituted the basis of some portion of the relief sought by plaintiff. In such case he responded to the other parts of the bill by plea or answer.

Disclaimer. Defendant might file a disclaimer where plaintiff's bill charged him only with claiming some interest in a specified subject matter and alleged no liability on part of plaintiff because of the claim or otherwise. In such case the disclaimer would ordinarily entitle plaintiff to a dismissal.

Plea. The defendant might interpose a plea to the whole bill or to any separable part thereof. The plea set up facts by way of denial or of confession and avoidance, which excused defendant from making the answer prayed for by the bill. It was the appropriate pleading for matter in abatement as distinguished from matter in bar. Matter in discharge, such as statute of limitations, release, or former recovery, was also apt subject for a plea. It was said that matter which went to a single essential element of the bill or of some separable portion of it might be properly pleaded in a plea. An example of a plea to a separable portion is a plea to the prayer for discovery, that the discovery would tend to incriminate the defendant.

Answer. By answer the defendant made the response called for in the bill, if the answer was to the whole bill. It was of course possible to demur to a part, interpose a plea to another part, and answer to the balance. The answer stated defendant's defense and made responses to the interrogatories contained in the bill.

Replication. This pleading consisted of a formal reassertion of the truth of plaintiff's bill and a denial of the truth of defendant's answer.

Federal Equity Rules. Under the federal equity rules, equity pleadings have been greatly simplified. The bill is required to be a short and plain statement of the facts without

the evidence. Demurrers are abolished and objections to the sufficiency of the bill are pleaded in the answer. There are no pleas. The matter formerly proper for them may be inserted in the answer or put forward on motion. And the answer must set out in plain and concise terms the defendant's defense to each claim asserted in the bill.

Under the Codes. Under most modern codes there is no separate equity pleading. The plaintiff states his case in his complaint as in an action at law, and the subsequent pleadings are as in a law action. The traditions of equity pleading, however, are still effective to make the usual complaint for equitable relief much more prolix and detailed than the complaint for legal relief.

CHAPTER VII

HOW TO READ AND ABSTRACT A REPORTED CASE

The Report. The report of a case may be merely a memorandum of a portion of the proceedings before a trial judge, for example, its rulings upon evidence, or a decision upon a demurrer or upon a motion for a nonsuit or a directed verdict; it may be a record of a hearing before a trial judge or the court en banc upon a motion in arrest of judgment, or for a new trial, or for judgment notwithstanding the verdict, or to take off a nonsuit and enter judgment upon a verdict taken by consent; or it may be an account of proceedings before an appellate court. If it is an adequate report, it will usually contain (1) the title of the case, (2) headnote or syllabus, (3) statement of the case, (4) abstract or arguments of counsel, (5) opinion or opinions of the court, and (6) a statement of the dispositon made of the case.

Title. The title of a case in an adversary proceeding in the trial court is usually made up of the names of the parties litigant with the designation of the character in which they respectively appear, as, Samuel Student, Plaintiff, v. Peter Policeman, Defendant; or Samuel Student, Plaintiff, v. Peter Policeman, Defendant; Oliver Officer, Intervenor. In non-adversary proceedings and even in some adversary proceedings the title contains the name of but one party, as In Re Peter Policeman, Bankrupt, or Ex parte Samuel Student. In the latter class of case, the title remains the same in the appellate courts; in the former, the practice differs. In some jurisdictions when the defendant appeals or sues out a writ of error, his name appears first, as Peter Policeman, Appellant (or Plaintiff in Error), v. Samuel Student, Appellee (or Respondent or Defendant in Error). Where the parties are designated as plaintiff or defendant in error, the case must be read with great care, for at times the court may use plaintiff to mean plaintiff below and at other times to mean plaintiff in error. In order to avoid such possible confusion, the practice has been adopted in some juris-

dictions of retaining the names of the parties in their original order and adding the designation of the characters in which they respectively appear in the trial and appellate courts, as Samuel Student, Plaintiff-Appellee, v. Peter Policeman, Defendant-Appellant; others retain them in the original order and add merely the designation in which they appear in the appellate court, as Samuel Student, Respondent, v. Peter Policeman, Appellant.

Headnote or Syllabus. The headnote or syllabus—sometimes made by the reporter, sometimes by the judge who writes the opinion—purports to be a brief abstract of the opinion of the court. Headnotes vary greatly in length, style and accuracy. Some set forth the facts in detail with a brief statement of the decision; some state what is intended to be the abstract proposition of law for which the case stands; and some combine the two forms. But whatever their form and whatever their authorship, headnotes are not, in absence of controlling statute, part of the opinion and are not to be treated as such. They are never to be relied upon until checked up by the opinion. Often they express mere dicta; frequently they are inaccurately phrased, and in some instances they are absolutely wrong.

Statement of the Case. The statement of the case, furnished either by the reporter or by the court, usually precedes the opinion, but is sometimes, in whole or in part, embodied in it. For example, in Tinn v. Hoffman & Co., 29 Law T. R. (N.S.) 271; 1 Williston's Cases on Contracts (2 ed.) 120; Corbin's Cases on Contracts, 155, the facts are set forth at length preceding the opinion; in Stanton v. Dennis, 64 Wash. 85, Corbin's Cases, 11, and in Wheat v. Cross, 31 Md. 99, Williston's Cases 131, they are stated by the court at the opening of the opinion; and in Lewis v. Browning, 130 Mass. 173, as printed in Corbin's Cases, 42, they are given in the last paragraph of the opinion. Besides showing the facts upon which the controversy turns, the statement of the case should set out the manner in which the points in dispute were brought to the attention of the trial court, whether, for example, on an objection to the introduction of evidence, on a demurrer, or on a motion. If the report is of a review of the trial court's decision, the statement should also make clear

the proceedings in the trial court so far as pertinent to the questions to be reviewed, the manner in which the case is brought to the reviewing court, and the grounds on which a reversal is sought.

Argument of Counsel. An abstract of the arguments of counsel is found in most of the older reports; but it has become customary with modern reporters usually to omit all reference thereto, except in so far as the opinion mentions counsel's contentions for the purpose of adopting or rejecting them. Usually the names of counsel are printed, sometimes preceding the opinion, and sometimes at the end of the case.

The Opinion. The opinion is ordinarily written for the court by one member thereof, whose name is indicated. Sometimes it is anonymous, and it is then in America designated a *per curiam* opinion. Occasionally one or more judges disagree with the majority and write dissenting opinions, setting forth the grounds for such disagreement. At times the several members of the court write separate opinions, although all agree in the result.

Disposition of Case. The statement of the disposition made of the case is usually very brief, such as "Rule nisi," or "Rule refused," or "Rule discharged," or "Rule absolute," or "Order affirmed," or "Judgment reversed," or "Reversed and remanded."

An explanation of some of these expressions may be helpful. The word rule in this connection is used in the sense of order. A "rule nisi" is a conditional order, usually in effect an order to show cause. Thus a rule nisi for a new trial is an order requiring the opposing party to show cause why a new trial should not be granted. "Rule refused" indicates that the application for an order has been denied, whether the order sought was conditional or unconditional. "Rule discharged" or "rule absolute" denotes the disposition made of a rule nisi. If the court determines, for example, on hearing of the rule nisi for a new trial that a new trial should not be granted, it discharges the rule nisi; if it determines that a new trial should be had, it makes the rule absolute. In more modern language the court disposes of orders or judgments, the validity of which is before them, by

affirming or reversing them, frequently sending the cases back, that is remanding them, to the trial court with instructions as to further disposition of the case.

Casebooks. In the books of selected cases upon various topics of the law, used in most law schools, the title includes not only the names of the parties, but also the date of the decision and a reference to the book and page of the official report wherein the case is reported. The headnote is not printed. Frequently the arguments of counsel are condensed or entirely omitted. In some cases only so much of the statement of facts and of the opinion is given as relates to particular points under consideration.

Dictum or Decision. In reading and analyzing any opinion of a judge or court, the true function of judicial tribunals in our scheme of government must be constantly borne in mind, namely, the settlement of actual controversies duly presented to them. It is no part of the duty of a court to pass upon moot cases or to answer hypothetical questions. Consequently when a real case is presented, the court performs all of its proper functions in deciding the issues actually submitted to it. Does this mean that it should simply render its decision that A should recover from B, or that the trial court ruled correctly or erroneously without indicating the reasons therefor? As was suggested in the first chapter, the law is the sum of the rules administered by the courts. These rules are deduced from the cases in which they are applied. In theory the court to which a new problem is presented attempts to decide it as it believes all cases on substantially similar facts should be decided. In other words, it attempts to formulate a general rule or statement of a principle applicable to all cases with the same operative facts and to determine the instant case accordingly. It is thereby laying down a rule by which the legal relations of the parties litigant are determined *ex post facto* and by which the conduct of other parties is expected to be ordered in the future. It is highly desirable that judge-made law should have sufficient uniformity and stability to enable members of the community to know in advance with substantial accuracy the legal effect of a particular line of conduct. Consequently prior decisions in the same juris-

diction should be followed in the absence of weighty reasons to the contrary. It is therefore clear that it is the proper function of the court to indicate in its opinion the rule which it is applying and the reasons why it deems such rule to be applicable. Anything further is unnecessary; and while it may be interesting, enlightening, and altogether sound, it cannot be considered of equal weight with those pronouncements of the court which are essential to the decision. Those portions of an opinion not necessary to the decision are usually called dicta or obiter dicta. When a court in discussing a case at bar, by way of illustration puts a hypothetical case and renders a decision thereon; or when it goes beyond the facts of the case at hand and enunciates a rule much broader than the issues submitted demand; or when the judge writing the opinion ventures a statement as to what the law is or should be upon a collateral matter, the court or judge, as the case may be, promulgates merely a dictum.

For instance, if a court in passing upon the enforceability of a gratuitous written unsealed promise should lay down the rule that no promise was enforceable unless supported by a consideration, this pronouncement would be inapplicable in a later action upon a promise under seal. In the case of Dickinson v. Dodds, 2 Chancery Division 463, Corbin's Cases, 174, 1 Williston's Cases on Contracts, 50, there were just two questions that it was necessary for the court to decide. The first was whether a certain memorandum signed by Dodds constituted a contract or a mere offer, and the second was, whether, if it were an offer only, Dickinson's acceptance was made while the offer was still open. Mellish, L. J., however, in the course of his opinion, delivered the following dicta: (1) "It is not necessary that both parties should be bound within the Statute of Frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document." (2) "Assuming Allan to have known that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still, in point of law, that could not prevent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds." (3) "It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead, and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer

impossible." Had all the justices agreed with Mellish, the case would not be regarded as of primary authority on these points because these utterances were not necessary for the decision of any issue presented.

On the other hand, those portions of the opinion setting forth the rules of law applied by the court, the application of which was required for the determination of the issues presented, are to be considered as decision and as primary authority in later cases in the same jurisdiction. For example, the authority of Dickinson v. Dodds is not limited to controversies wherein the parties have those identical names, or the memorandum contains precisely the same words, or the offeree goes through exactly the same mental processes and does the same overt acts, and the offerer's conduct and the offeree's notice of it are duplications in detail of those of Dodds and Dickinson. Indeed, an examination of that case shows it to be primary authority for the following propositions: 1. In construing a writing, all portions of it must be taken into consideration. This is nowhere distinctly stated by the court, probably because it is too well settled to call even for statement and was conceded by both sides. As the point was neither argued nor discussed, the decision would not be of great weight but would show the court's understanding and application of the rule. 2. An offerer whose promise to keep the offer open until a specified date is neither under seal nor supported by a consideration is privileged to revoke it before that date. 3. The power of an offeree to accept an offer is destroyed when before acceptance knowledge that the offerer has revoked the offer reaches the offeree, even though he receives such knowledge from some source other than the offerer or his agent. Neither the second nor the third proposition can be found verbatim in any of the opinions, but they are clearly at the foundation of the opinions of both James, L. J., and Mellish, L. J., and the substance of them is stated. This case then may be said to be a decision upon three propositions which are nowhere specifically phrased in it, and to contain only dicta as to three propositions which may be quoted in the exact language of Lord Justice Mellish.

Same—Several Errors Alleged. There are many cases where a hypercritical examination of the opinion might lead one to say that none of the several propositions enunciated by the court

constitutes decision, but all must be classed as dicta. For example, defendant appeals from an order denying a new trial, and assigns four separate and distinct errors. The appellate court determines that the trial court was wrong upon each ground of error assigned. Now it may be said that all the appellate court is called upon to determine is whether the trial court erred in denying a new trial. If the latter court was wrong in one of the respects specified, its order must be reversed. Consequently, the appellate court's opinion upon one only of these points is decision, and upon all others constitutes dicta; and since it has not placed its decision exclusively upon one ground, the entire opinion must be regarded as dicta. This reasoning is, however, too refined for practical purposes. The appellate court may very properly give the trial court instruction how to proceed on a new trial. While it is true that it need have considered only one of the alleged errors, in order to decide the case, yet each one of them was distinctly presented to it for consideration and was deliberately passed upon.

A somewhat similar situation is presented if, in the above case, the court determines that the trial court did not err in the first three respects assigned, but did err in the fourth. The pronouncement upon the fourth error is clearly decision; but what of that upon the first three? Here, again, these three issues were distinctly presented and deliberately considered, and the court's determination thereof must be treated as decision and not as dicta. Obviously, if the appellate court finds no error in any of the respects assigned, its findings on all four are decision, for they were essential to the determination that the trial court's order be affirmed.

The Value of Dicta and of Foreign Decisions, etc. While a previous case is entitled to weight as primary authority only upon the points necessarily decided, it must not be assumed that a judicial dictum is without value. A well-considered dictum by a judge of ability and learning may have a powerful influence upon the development of the law. It may be considered of much greater worth than a square decision from a foreign jurisdiction or even from a sister state. It cannot be safely ignored by student or practitioner. Of course, normally, prior decisions from the same jurisdiction will receive chief attention; cases in

point from other jurisdictions, dicta from the same and from other jurisdictions and the opinions of text writers, commentators and legal essayists will be considered of less moment, but all of them may be of importance in aiding the court to reach a satisfactory conclusion in a particular case. Prior decisions of the court of last resort, all the inferior courts of the same jurisdiction will feel bound to follow except in most extraordinary circumstances, and the burden of overthrowing them even in the court which rendered them will be heavy. Prior dicta are given respectful attention, but their influence depends very largely upon the particular circumstances under which they were uttered. Decisions and dicta from other jurisdictions owe their persuasive force in a great degree to their inherent worth, but the courts do not overlook the importance of having harmonious rules upon the same subject in the several states and, indeed, in all the jurisdictions with the same law system. The published views of legal writers, except in so far as supported by judicial decisions, should have their influence measured only by their reasonableness and utility.

Abstracting a Case. As preparation for classroom work, the student is in each course required to read an assigned number of cases. He should get those cases so thoroughly in mind as to be able to state them in the same manner in which counsel, in argument of a case at bar, would present his authorities to the court. This he can never do without reading and rereading each of them until he has a complete understanding of it. Any unfamiliar words or phrases he should look up in a law dictionary. As an aid in thus fixing them in mind, he should make a careful abstract of each case. This abstract, like the statement of a case in argument, should contain the following parts, and ordinarily the parts should be arranged in the order indicated:

1. Title, date, and place where reported in the reports.

2. Statements of the facts in the case, including a statement of the manner in which the issue was presented to the trial court. That is, besides the facts relevant to the dispute between the parties, it should be shown whether the trial court considered the case on demurrer, or on a trial on the merits, or on motion in arrest of judgment or for a new trial, etc.

3. Statement of the disposition made of the case by the trial

court, including such rulings of the court as are pertinent to the issues presented to the appellate court.

4. Statement of the manner in which the case comes before the appellate court, including the grounds of error alleged by appellant.

5. Decision of the appellate court.

6. Reasons upon which the decision is based, including, where important, the manner in which the court meets the argument advanced by counsel.

The foregoing suggestions assume that the case to be abstracted is not a decision of the court of first instance. Where such is not the fact, the abstract must be modified to meet the particular case; but the essential elements indicated should appear.

A sample abstract of the case of Dickinson v. Dodds follows:

DICKINSON v. DODDS, 2 Ch. Div. 463, 1876.

June 10 Dodds delivered to Dickinson a memorandum agreeing to sell to Dickinson certain premises for £800, to which he attached a postscript stating "this offer" to be open till June 12, 9 A.M. In the morning of June 11 Dickinson decided to accept, but did not communicate his acceptance to Dodds. The same afternoon Dickinson learned that Dodds had agreed to sell the premises to one Allan. Thereafter and before 9 A.M. June 12, Dickinson gave Dodds his acceptance in writing. Dodds refused to convey. Dickinson brought suit in equity against Dodds and Allan for specific performance of the alleged agreement.

The cause was tried before Vice-Chancellor Bacon, who on the above facts decreed specific performance. The defendants appealed.

On appeal the plaintiff's bill was dismissed. Dickinson was not entitled to recover because

1. The memorandum contained a mere offer, which was revocable at any time before acceptance.

2. The revocation of an offer is effective as soon as the offeree knows that the offer has been revoked, even though the offerer has given him no notice thereof.

CHAPTER VIII

REPOSITORIES OF THE LAW AND SUGGESTIONS FOR USING THEM

The repositories of the law contain materials by the use of which the lawyer is assisted in predicting, with more or less accuracy, what the courts, or other tribunals established by society, will do when properly set in motion, how they will solve controversies properly brought before them. Some of these repositories contain materials which are usually thought to be of controlling or almost controlling influence, and others, materials of merely persuasive effect. The former are generally—and are here, for convenience—designated books of primary authority; the latter, books of secondary authority. In addition there are books which do not contain such materials but only helps for finding them. They are called herein key books. Any such classification must be more or less arbitrary. It is quite impossible to draw an accurate line between material of controlling effect and material of merely persuasive value. When once any such line is plotted, any single book is likely to exhibit materials of both classes. Books listed as key books frequently have much matter that might properly be put in books of secondary authority, and books of primary authority almost invariably contain secondary and key material. Consequently, it must be understood that the more or less standard classification herein used has been adopted for purposes of convenience only.

BOOKS OF PRIMARY AUTHORITY

A. Statutes in the United States.

1. *Constitutions.*

a. Constitution of the United States.

Usually published in compilations of federal statutes, and frequently in compilations of state statutes.

For example:

United States Revised Statutes (2d ed.), pp. 17-32.

U. S. Compiled Statutes, Vol. 10, p. 13062, Vol. 11 (Annotated).
Federal Statutes Annotated, Vols. 10, 11 (Annotated).
Barnes, Federal Code, pp. 23-38.
General Statutes of Connecticut, Revision of 1918, pp. 23-40.
Ohio General Code revised to 1921, Throckmorton, pp. V-XII.
Officially published in 1924 with annotations in Senate Document No. 154 of the Sixty-eighth Congress.

b. Constitutions of the several states.
Usually the constitution of a state is published in the compilation of the statutes of that state.
For example:
General Statutes of Connecticut, Revision of 1918, pp. 41-67.
Throckmorton's Ohio General Code revised to 1921, pp. XXVI-XLVII.

2. *Treaties.*

Treaties of the United States with foreign nations and with the Indian tribes are contained in the U. S. Statutes at Large. They are also contained in the U. S. Treaty Series published by the Government Printing Office. The treaties to 1913 are to be found in the collection of William T. Malloy, issued in 1910 by the Government Printing Office. Two supplementary volumes bring them to 1923. The Carnegie Endowment for International Peace has published the Treaties of Peace, 1919-1923. There is also a collection of treaties by Hill, Leading American Treaties, 1922.

3. *Federal Statutes.*

a. United States Statutes at Large.—These contain all acts of Congress arranged chronologically, treaties, concurrent resolutions and proclamations of the President, as originally enacted or promulgated. At the close of each session of Congress the above-mentioned documents of that session are published by the Government.

b. Revised Statutes of the United States.—The first edition contains all acts of Congress of a general and permanent nature in force December 1, 1873. The second edition was published in 1878, and until 1901 was kept up to date by supplements issued periodically.

c. Compiled Statutes of the United States.—The

twelve volumes originally issued contain all acts of Congress of a general and permanent nature in force January 1, 1915. A two-volume supplement brought the work down to March 4, 1919. These volumes contain also extensive annotations to the statutes, which, of course, fall without the class of material characteristic of books of primary authority. A so-called "Compact Edition" contains in one volume the statutory text found in the original twelve volumes, without annotations, and it has been brought to January 1, 1925, by a one-volume supplement. Supplements keeping the material up to date are published in the Federal Reporter.

d. Federal Statutes Annotated.—The second edition contains in twelve volumes all the acts of Congress of a general and permanent nature in force on January 1, 1916. Annual supplements are issued. Quarterly pamphlet supplements keep the text up to date. All these publications contain by way of annotations much material characteristic of books of secondary authority.

e. United States Statutes Annotated.—Seven volumes have been issued. Titles and arrangement are as in the Revised Statutes. The seventh volume was issued in 1919. Annotated fully.

f. Barnes Federal Code.—This contains the acts of Congress of a general and permanent nature in force December 31, 1918, classified and arranged as in the Revised Statutes of the United States. A one-volume supplement brings it down to January, 1923.

4. *Statutes of the several states.*

a. Session Laws.—After the close of each legislative session in any state, the enactments of the legislature during that session, arranged chronologically, are published by the state or under its authority. They are commonly called session laws, but in some states they are otherwise designated. For example, in Connecticut they are usually referred to as Public Acts, in Florida as General Acts, in Wisconsin as Session Laws.

b. Compilations, Consolidations, Revisions, Codes.—At intervals in each state, the legislature provides for the rearrangement or restatement or both of all existing statutory enactments. In some instances the provision is merely for republishing

the statutes in chronological order omitting repealed and obsolete enactments; in others it is for republication with arrangement according to subject matter; in others for a rewriting and restating of the existing laws with needed amendments. In the last case the restatement is enacted by the legislature. In the others, the legislature usually merely authorizes the rearrangement of statutes then in force without alteration or amendment and makes the new publication only prima-facie evidence of the law, as it exists in the previously enacted statutes. An example of the former is found in the Revised Laws of Minnesota, 1905; of the latter in the General Statutes of Minnesota, 1913. In some instances the restatement or revision of only a portion of the statutory law is provided for, as in the case of the New York Civil Practice Act, 1919.

5. *Municipal Charters.*

Frequently, and formerly always, these were merely acts of the legislature. Often they are now so-called Home Rule Charters, adopted by vote of the electors of the municipality.

6. *Municipal Ordinances.*

Ordinances passed by the legislative body of a municipality pursuant to valid authority given by its charter have the same effect within the municipality as do enactments of the state legislature within the state.

7. *Regulations and Orders of Administrative Commissions and Officers.*

These, when made pursuant to properly delegated authority, have substantially the effect of statutes, *e.g.*, Regulations and orders of the State Board of Health of Minnesota.

8. *Rules of Court.*

For the conduct of litigation in the various courts, rules are promulgated by them which, within their proper sphere, have the force of an enactment of the legislature. They are usually published as an appendix to reports of decisions, and ordinarily they can be obtained in pamphlet form from the clerks of the respective courts.

B. Statutes in England.

1. *Constitutions—No written constitution.*

2. *Treaties.*

The Treaties of Great Britain with other nations from 1829 to date are published in British and Foreign State Papers (112 volumes to 1922) and the treaties from 1892 to date in the Treaty Series.

3. *Statutes.*

a. The Statutes Revised.—The second edition in twenty volumes contains in chronological order the live statutes from 1235 to 1900. An official publication.

b. Public General Statutes.—These contain the statutes from 1901 to date. There is an official edition, and an unofficial Law Reports edition.

c. Chitty's Statutes of Public Utility.—The first 16 volumes contain the statutes which the unofficial publishers deem of general importance through 1910; the 17th and 18th volumes, through 1916, and annual supplements, to date.

4. *Statutory Rules and Orders.*

These contain in 13 volumes the statutory rules and orders of general and permanent importance in effect December 31, 1903. Annual volumes bring and keep the work up to date.

5. *Rules of Court.*

C. Reports of Judicial Decisions in the United States.

1. *Reports of Decisions of Federal Courts.*

a. United States Supreme Court Reports.

1789-1900, Dallas, 4 volumes.
1801-1815, Cranch, 9 volumes.
1816-1827, Wheaton, 12 volumes.
1828-1842, Peters, 16 volumes.
1843-1860, Howard, 24 volumes.
1861-1862, Black, 2 volumes.
1863-1874, Wallace, 23 volumes.
1875 to date, United States Supreme Court Reports beginning with Volume 91.

Dallas and Cranch were unofficial reporters. Wheaton in 1817 was appointed official reporter, and since that date the decisions of the court have been reported by an official reporter. The reports from 1789 to 1874 inclusive are cited as volumes 1 to 90 United States Supreme Court

Reports as well as by the name of the reporter. The reports since 1875 are not cited by the name of the reporter.

b. United States Supreme Court Reporter.—This is an unofficial publication reporting the decisions of the United States Supreme Court beginning with those in Volume 106. From three to five volumes of the official reports are contained in one volume of the Reporter. Advance sheets report current decisions.

c. United States Supreme Court Reports, Lawyers' Edition.—This unofficial publication contains all cases reported in the regular reports; each book includes several volumes of the official reports. Semi-monthly advance sheets report the current decisions. This publication contains much material properly belonging to books of secondary authority, *e.g.* editorial headnotes, summaries of briefs of counsel, editorial annotations, tables of cases affirmed and reversed, etc.

d. Federal Cases.—This is an unofficial reprint in 31 volumes of all published decisions of the United States Circuit Courts and of the United States District Courts from 1789 to 1879. It has almost entirely superseded the reports from which it is reprinted. The cases are arranged alphabetically and numbered consecutively. They are cited by title and number, rather than by title, volume and page.

e. Federal Reporter.—This contains all the published decisions of the United States Circuit Courts from 1880 to 1912, when they were abolished, of the United States District Courts from 1880 to date, and of the United States Circuit Court of Appeals from its organization in 1891, and of the Commerce Court.

f. Court of Claims Reports.
1855-1856, Devereux's Reports.
1863 to date, Court of Claims Reports.

g. Court of Customs Appeals Reports.—The publication of the decisions of this court began in 1910. Current decisions are published in the weekly pamphlet of Treasury Decisions.

h. Reports of Decisions of Courts of District of Columbia, the territories and Outlying Possessions of the United States.—See below under Reports of Decisions of Courts of the Several States, etc.

2. *Reports of Decisions of the Courts of the Several States, Territories, and Possessions of the United States.*

a. So-called Official Reports.

A complete list of the reports of the courts of the several states and territories, the District of Columbia, Porto Rico, and the Philippine Islands will be found in Hicks, pages 559-571; in the appendix of the pamphlet, *Law Books and Their Use*, published by the Lawyers Coöperative Publishing Co. and Bancroft-Whitney Co. and distributed free of charge, and in numerous other easily accessible publications. Consequently, they will not be enumerated here. It is necessary only to mention that some of the earlier reports in some jurisdictions are by unofficial reporters, and are in such condensed or abbreviated form as to be of less value than current reports. An acquaintance with the system of courts in a jurisdiction is sometimes required in order to be able to distinguish the reports of inferior and intermediate appellate courts from those of courts of last resort.

b. Unofficial Reports.

(1) The Reporter System.—This system reports all current decisions of all appellate courts of the United States and of the several states, and some decisions of lower courts. These reports are usually published much in advance of the official reports. Weekly advance sheets are issued. All opinions of the courts in question are printed in full. The United States Supreme Court Reporter and the Federal Reporter have been noticed above. The other units of the system are shown below. They report the decisions of the courts of the jurisdictions named, beginning (unless otherwise stated) with page 1 of the indicated volume of the so-called official reports.

(a) Atlantic Reporter (begins 1885)

Connecticut—Vol. 53
Delaware—Chancery, Vol. 6
Houston, Vol. 7
Marvel, Vol. 1
Pennewill, Vol 1
Boyce, Vol. 1
Maine—Vol. 77, page 408
Maryland—Vol. 64
New Hampshire—Vol. 63, page 446

New Jersey—Law—Vol. 47, page 349
Equity—Vol. 40, page 345
Pennsylvania—Vol. 110
Rhode Island—Vol. 15
Vermont—Vol. 58

(b) Northeastern Reporter (begins 1885)
Illinois (Sup. Ct.)—Vol. 114
Indiana (Sup. Ct.)—Vol. 102
(App. Ct.)—Vol. 1
Massachusetts—Vol. 139
New York—Vol. 99
Ohio—Vol. 43

(c) Northwestern Reporter (begins 1879)
Dakota—Vol. 1
Iowa—Vol. 51
Michigan—Vol. 41
Minnesota—Vol. 26
Nebraska—Vol. 8, page 294
Nebraska Commissioners' Decisions, Vol. 1
North Dakota—Vol. 1
South Dakota—Vol. 1
Wisconsin—Vol. 46

(d) Pacific Reporter (begins 1883)
Arizona—Vol. 1
California—Supreme—Vol. 64
Appellate—Vol. 1
Colorado—Supreme—Vol. 7
Appellate—Vol. 1
Idaho—Vol. 2
Kansas—Supreme—Vol. 30
Appellate—Vol. 1
Montana—Vol. 4
Nevada—Vol. 17
New Mexico—Vol. 3
Oklahoma—Supreme—Vol. 1
Criminal Appeals—Vol. 1
Oregon—Vol. 11
Utah—Vol. 3
Washington—Vol. 1
Territory—Vol. 2
Wyoming—Vol. 3

(e) Southeastern Reporter (begins 1887)
Georgia—Vol. 79
Georgia Appellate—Vol. 1
North Carolina—Vol. 96
South Carolina—Vol. 26

Virginia—Vol. 82, page 964
West Virginia—Vol. 29

(f) Southern Reporter (begins 1887)
Alabama—Vol. 81
Alabama Appellate—Vol. 1
Florida—Vol. 23
Louisiana—Annual—Vol. 39
Mississippi—Vol. 64

(g) Southwestern Reporter (begins 1886)
Arkansas—Vol. 47
Kentucky—Vol. 84, page 202
Indian Territory—Vol. 1
Missouri (Supreme)—Vol. 89
(Appellate)—Vol. 94 (Also part of Vol. 93)
Tennessee—Vol. 85
Texas—Vol. 66
(Appellate)—Vol. 21
(Civil Appeals)—Vol. 1
(Criminal Reports)—Vol. 31

(h) New York Supplement (begins 1888)
This reports the decisions of the lower courts of New York which are published in the following reporters and many not published in any of them.
Abbott—Vol. 23
Appellate Division—Vol. 1
Civil Procedure—Vol. 14
Civil Procedure Reports, New Series—Vol. 1
Bradbury's Pleading & Practice Reports—Vol. 1
Demarest's Surrogate—Vol. 6, page 413
Connolly's Surrogate—Vol. 1
Gibbons' Surrogate—Vol. 1
Power's Surrogate—Vol. 1
Mills' Surrogate—Vol. 1
Daly—Vol. 14, page 497
Hun—Vol. 48, page 304
Miscellaneous Reports—Vol. 1
Criminal Reports—Vol. 6
Superior Court—Vol. 56
Silvernail—Vol. 1
Annotated Cases—Vol. 1
Leading Cases Annotated—Vol. 1

3. *Reports of Selected Decisions of Federal and State Courts. (General.)*

These are series of cases believed by the editors and compilers to be of general value and authority, dealing usually with questions which are of more than local value, or which are novel, or upon which there is a conflict of authority. The volumes in which they are published contain, by way of annotation, much material of secondary authority. (See below Books of Secondary Authority F.)

a. The Trinity Series.
   (1) American Decisions, 100 volumes (1760-1869).
   (2) American Reports, 60 volumes (1870-1887).
   (3) American State Reports, 140 volumes (1887-1911).

b. Lawyers Reports Annotated.
   (1) L.R.A., First Series, 70 volumes (1888-1905).
   (2) L.R.A., New Series, 52 volumes (1906-1914).
   (3) L.R.A., Third Unit, 24 volumes (1915-1918).

c. American and English Annotated Cases, 21 volumes (1906-1912). Cases from Canadian and British reports are included.

d. American Annotated Cases, 32 volumes (1912-1918). This series represents a consolidation of American State Reports and American and English Annotated Cases.

e. American Law Reports Annotated. This series represents a consolidation, and is a continuation of, Lawyers Reports Annotated and American Annotated Cases. Publication began in 1919; about six volumes per year are issued.

4. *Reports of Selected Decisions of Federal and State Courts upon Special Subjects.*

a. American Bankruptcy Reports. Contains bankruptcy cases in Federal and State Courts, 49 volumes (1899-1923).

b. American Bankruptcy Reports, New Series, 1923 to date.

c. American Criminal Reports, 15 volumes (1877-1909). Contains selected criminal cases from American, English, Scotch, Irish and Canadian law reports.

d. Negligence and Compensation Cases. Contains selected cases dealing with negligence, employer's

liability and workmen's compensation decided by American, English and Canadian Courts from 1912 to date. This series is a continuation of American Negligence Reports, 21 volumes (1896-1910), which in turn was a continuation of American Negligence Cases, 17 volumes (1789-1896).

e. Public Utility Reports Annotated. Contains what the editors deem important decisions and orders of commissions and courts concerning regulation of public utilities from 1915 to date. Advance sheets are issued biweekly.

f. For a list of other series of selected cases (which have been discontinued), see Hicks, Materials and Methods of Legal Research (1923), p. 559.

D. Reports of Judicial Decisions in England.

1. *Prior to the Year Books.*

a. Bigelow, Placita Anglo-Normanica, containing miscellaneous cases from William I to Richard I (1066-1195), collected by Melville M. Bigelow from various historical documents and published in 1879.

b. Plea Rolls.—The earliest known plea rolls date from 1194. The plea roll of a term was a record of each case tried at the term. It contained much the same information for each cause as is found in the modern common law record of an action. Of course, the names of the parties appeared as well as the kind of action. In place of the modern written pleadings were the statements of the respective contentions of the parties with the issue as finally formulated for decision. If there was a verdict by the jury, that was included, as well as the judgment of the Court upon the verdict.[1] All these rolls in the Curia Regis through 1201 have now been made accessible in the following:

(1) Palgrave, Rotuli Curiae Regis (1194-1199), published in 1835.

(2) Maitland, Three Rolls in King's Court (1194-1195), published in 1891.

(3) Curia Regis Rolls, published by the British Government in 1923 and 1925.

[1] Bolland, The Year Books 27, 28 (1921).

Cases from other rolls are available in[2]

(1) Baildon, Select Civil Pleas, 1889 (1200-1203).
(2) Maitland, Select Pleas of the Crown, 1888 (1200-1225).
(3) Healey, Somerset Pleas, 1897 (1200-1257).
(4) Clay, Three Yorkshire Assize Rolls, 1911 (1202-1208).
(5) Maitland, Gloucester Pleas of the Crown, 1884 (1221).
(6) Watson, Bristol Pleas of the Crown, 1902 (1221).
(7) Parker, Calendar of Lancashire Assize Rolls, 1904-1905 (1241-1285).
(8) Page, Three Northumberland Assize Rolls, 1891 (1256-1279).
(9) Bracton's Note Book, 1887 (1218-1240).
(10) Phillimore, Pleas of the Court of King's Bench, 1898 (1297).

And excerpts from rolls from the reigns of Richard I to Edward III are found in a compilation made during the reign of Elizabeth and known as

Abbreviatio Placitorum (1189-1327).

Records of some early state trials with reports of testimony, etc., are published in

(1) Cobbett and Howell, State Trials, 1809-1828 (1163-1820).
(2) Tout and Johnstone, State Trials of Edward I, 1906 (1289-1293).

2. *The Year Books.*[3]

These early reports cover the period from 1289 to 1537 with some intermissions in the reigns of Edward I, Henry VII and Henry VIII. They are to be sharply discriminated from the plea rolls. The plea roll of a term contained the official record of each case tried. This record was intended as a permanent memorial of the litigation and its result. Needless to say the roll included much material of great value to lawyers and judges, as Bracton's Note Book amply demonstrates; yet it was not designed for the use or benefit of the legal profession but rather for the in-

[2] The date immediately following the title is the year of publication; the date in parenthesis indicates the period covered by the cases.

[3] See generally, Bolland, The Year Books (1921); Bolland, Manual of Year Book Studies (1925).

formation and protection of officials, parties to the respective actions and their privies. The reports which make up the Year Books, on the other hand, are obviously of a character valuable principally to bench and bar. They set down the things occurring at the trial which the trial lawyer and the trial judge want to know. They exhibit the application of many rules of substantive law, but no one can read a volume of them without concluding that the chief interest of their authors was in procedure. Obviously what they wanted to preserve was a guide for proper pleading and trial practice.

The internal evidence makes it tolerably clear that the reporters were recording events occurring in their presence,—often they seem to be giving the very language of the pleaders and the justices. Of course, no one knows just how, or under what conditions the reporters did their work. It is possible, however, to reconstruct a plausible picture of a mediaeval court scene. Mr. Bolland has allowed his legal-historical imagination to play thus:

"Serjeants are arguing a case. There may be some half-dozen or more of them engaged in it. They are talking one against another. The Justices are intervening now and again in the debate. Repartees, sarcasms, aptly quoted proverbs, verses from the Bible and what not are being bandied about. . . . And somewhere in that Hall, perhaps in the apprentice's Crib, perhaps elsewhere, there is a little company of men, how few or how many I will not even attempt now to guess, who in some sort of shorthand of their own are noting down in the living language of the day the speeches and shifting arguments of the Serjeants and the matters of fact they spoke of, hot from the actual present life of the time, the jibes, the retorts, the quips, the criticisms by the Court, the judgments—whatever else that might interest them."[4]

Colorful incidents are not wanting. Passeley in argument refers to a badly drawn document as the work of no lawyer but of a man-at-arms, at which Chief Justice Bereford interjects: "Men-at-arms are clever at making a mess of work of this sort."[5] When counsel is arguing for his interpretation of a statute, Hengham curtly interrupts: "Do not gloss the statute; we understand it better than you do, for we made

[4] Bolland, The Year Books, 3-4.
[5] Y. B. 5 Ed. II 140 (1311).

it."[6] And when Grene is somewhat too emphatic in his assertions in opposition to suggestions from the court, Stonore puts him in his place thus: "I am amazed that Grene makes himself out to know everything in the world, and he is only a young man."[7] Not always does the record reflect a proceeding that accords with modern notions of judicial dignity. From the bench sometimes comes a story or an allusion that could not be uttered in a mid-Victorian drawing room. Frequently remarks are punctuated with profanity. All in all, the reader is given the impression that the participants, be they judges or lawyers, are very human; and that, notwithstanding their calling, both they and the reporters have a sense of humor. The once commonly accepted notion that these reporters were paid officials of the court has been exploded. It is now rather generally believed that they were men with some training in the law. Just how much is uncertain, but certainly they had not reached the rank of serjeant.

In 1481 or 1482 some Year Books from the reign of Henry VI were put into print, and from that time until 1680 various printers, including Rastell, Pynson and Totell, published many of them. In 1678-1680 eleven volumes, comprising the standard black-letter edition of the Year Books, were printed; and until the latter part of the nineteenth century no more were published. The text of these is almost unbelievably bad. Maitland, who knew them well, called them a "hopeless mass of corruption." Bolland, who is more familiar with them than any living writer, seconds Maitland's statement, and explains the fact by pointing out that they were printed from manuscripts which were anything but accurate and which were liberally interspersed with abbreviations that could not be expanded by the ordinary editor or printer, and that they were execrably edited. The combination of corrupt manuscripts, carelessly ignorant transcribers and incompetent editors naturally made "a horrible mess of the work."[8] And yet they are a veritable mine of information concerning English legal history.

Between 1866 and 1879 the British Records Office produced in five volumes the Year Books for 20 to 35

[6] Y. B. 33-35 Ed. I 78 (1305).
[7] Y. B. 18-19 Ed. III 446 (1344-45).
[8] Bolland, The Year Books, 45-46.

Edward I (1292-1307) edited by Mr. A. J. Horwood in scholarly fashion, and between 1883 and 1911 the Years Books for 11 to 20 Edward III (1337-1346) in fifteen volumes, the first volume edited by Mr. Horwood and Mr. Luke Owen Pike, the others by Mr. Pike, whose editorial work excelled Horwood's. The Year Book for 12 Richard II (1389-1390) was published in 1914 by Harvard University Press under the Ames Foundation. The Selden Society, between 1903 and 1925, published sixteen volumes of Year Books of the early years of Edward II (1307-1315) ably edited by Maitland, Turner, Harcourt, Bolland, Vinogradoff and Ehrlich. It is still engaged in its plan to publish at least the remaining years of that reign. The result is that there are at present in print the following series of Year Books:

The Black Letter Edition (1307-1537) (unsatisfactory).
Rolls Series, Horwood (1292-1307).
Rolls Series, Horwood and Pike (1337-1346).
Selden Society (1307-1315).

3. *From the Year Books to "The Law Reports."*

From the beginning of the sixteenth century there has been no lack of law reports in England, but not all reports have been of equal worth; indeed they vary in merit from excellent to worthless. "Published reports," as Mr. J. C. Fox explains, "require sifting to enable us to form a true estimate of their value. In considering a set of reports as a complete work, some of the following questions are suggested: What were the qualifications of the reporter? Under what circumstances were his reports published? Did he himself take notes of the cases or did he borrow and from whom? Were the reports published during his lifetime or edited by others after his death? Were they prepared by him with a view to publication? What opinions as to the authority of his reports have been delivered by judges and learned writers? What are the special features of the several editions?"[9] The considerations to be weighed in valuing a report, and particularly the attention to be paid to critical comment thereon by judges and text writers are more fully discussed by Wallace in the opening chapter of his book, "The Reporters." Wallace records his estimate of the worth of the English reporters through

[9] J. C. Fox, Handbook of English Law Reports, 1913, 1-2.

the reign of George II;[10] Fox has given his opinion of the merit of the reporters in the House of Lords, the Privy Council and Chancery from the point where Wallace ends to the time when "The Law Reports" begin in 1866,[11] and Mr. Van Vechten Veeder has set down his judgment of the value of all the reporters from 1292 to 1865.[12] A full list of English reporters may be found in Hicks,[13] pages 535-547, in Cooley, Brief Making and the Use of Law Books, 51-59, and in numerous other places; hence, they will not be set down here. Suffice it to say that it seems to be generally agreed that of the earlier common law reports the following are of excellent authority: Dyer, Plowden, Coke, parts 1-11, Croke, Yelverton, Hobart, and Saunders; the following very good: Moore, Willes, Foster and Wilson; the following good: Anderson, Leonard, Davies, Rolle, O. Bridgeman, Sir T. Jones, Lord Raymond, Parker; the following from poor to worthless: Noy, Coke, parts 12, 13, Godbolt, Goulds-borough, Popham, Lane, Ley, Hutton, J. Bridgeman, Latch, Hetley, Aleyn, Siderfin, Keble, Modern excepting volumes 2, 6 and 12, Comerbach, Salkeld, volume 3, Gilbert, Cases in Law and Equity, Fitzgibbon, W. Kelynge, Sayre. From Burrow on, most of the reports, except Lot, the eighth volume of Taunton, and Anstruther, have been of good repute. Most of the early Chancery reports are poor; not till Peere Williams (1695-1736) is there a clear and accurate reporter. Cox's reports (1783-1796) are the next worthy of much commendation; thereafter the chancery reports are generally satisfactory, ranging from fair to excellent.

4. *"The Law Reports."*

Since 1865 "The Law Reports" have been published by the Incorporated Council of Law Reporting, a private institution, not under government control. The reporters are employed and paid by this corporation but are appointed with the approval of the judges; and their reports are not published until after approval or revision by the judges. From 1866 to 1875 the reports were issued in three series as follows:

1. Appellate, consisting of English and Irish Ap-

10 John William Wallace, The Reporters (3d ed., 1855).

11 See note 8.

12 The English Reports, 1292-1865, 15 Harv. L. Rev. 1, 109.

13 Hicks, Materials and Methods of Legal Research.

peal Cases before the House of Lords, Scotch and Divorce Appeals before the House of Lords and Privy Council Appeal Cases.

2. Chancery, consisting of Chancery Appeal Cases, including Bankruptcy and Lunacy, and Equity Cases before the Master of the Rolls and before the Vice-Chancellors.

3. Common Law, consisting of Admiralty and Ecclesiastical Cases, Common Pleas Cases, Exchequer Cases, Queen's Bench Cases and Probate and Divorce Cases. With each section were reported Cases on Appeal from the court in question; thus, in Queen's Bench Cases were included cases in the Exchequer Chamber on Appeal from the Court of Queen's Bench.

These three series with their subdivisions made ten sets of reports. By the acts of 1873 and 1875 the Supreme Court of Judicature was established, consisting of the Court of Appeal and the High Court of Justice with its five subdivisions, namely, Queen's Bench Division, Common Pleas Division, Exchequer Division, Chancery Division, and Probate, Divorce and Admiralty Division. The ten sets were reduced in 1875 to six: (1) Appeal Cases, comprising all in the former Appellate Series; (2) Queen's Bench Division; (3) Common Pleas Division; (4) Exchequer Division; (5) Chancery Division, and (6) Probate Division. Each of these last five reported not only the cases of original jurisdiction in the particular division, but also the decisions of the Court of Appeal on appeals from that division. Since 1881, when the Common Pleas Division and the Exchequer Division were merged in the Queen's Bench Division, but four sets of reports have been published, namely, Appeal Cases, Queen's or King's Bench Division, Chancery Division and Probate Division.

Before 1865 the English reports are cited by the name of the reporter; from 1865 to 1890 they are cited as Law Reports followed by the number of the volume and the name of the court, usually abbreviated thus L.R. 5 Q.B. or L.R. 5 Q.B.D. The Appeal Cases in the House of Lords and Privy Council, however, are cited merely by volume number followed by Appeal Cases, abbreviated App. Cas. From 1891-1926 the reports are cited by giving the year of publication, the number of the volume for that year, and the abbreviation of the name of the court, thus: L.R. 1923, 2 K.B. and 1923 App. Cas. Since January 1, 1926, the method of citation has been still further simplified:

the year of the report and the initial letters of the court only are used, thus: [1926] 1 K.B.; [1926] A.C.

5. *English Reprints.*
   a. English Reports—Full Reprint. This, when completed, will reprint verbatim all the English reports, except the Year Books, prior to 1865. The 169th volume was published in January, 1926.
   b. The Revised Reports. This reprints all cases of common law and equity deemed to be of present value from 1785 to 1865.
   c. English Common Law Reports, an American reprint of cases in King's Bench and Queen's Bench from 1813 to 1872.
   d. English Chancery Reports, an American reprint of cases decided 1843 to 1874.
   e. Moak's English Cases contains in thirty-eight volumes English Cases decided between 1872 and 1889, with notes.
   f. There are several other American reprints of portions of English reports, but they are not of importance.

6. *Collateral Reports.*
   a. During the period before 1865, reports which had the supervision of the court were called authorized; all others were referred to as collateral. No attempt is made here to mention them. They will be found listed in Hicks, 535-547.
   b. Law Times Reports. The Law Times since 1843 has currently reported cases from all courts.
   c. The Times Law Reports. These reports since 1885 have published current cases from all courts.
   d. Weekly Notes. This is a publication of the Incorporated Council of Law Reporting, which since 1866 has given advance reports of cases later published in "The Law Reports."

7. *Reports of Selected Decision of English Courts.*
   a. Bankruptcy & Company Winding Up Cases, begun in 1915 and succeeding Manson's Bankruptcy and Companies Cases which began in 1894 and ended in 1914.
   b. Cox's Criminal Law Cases, begun in 1843.
   c. Cohen's Criminal Appeal Reports, begun in 1908.
   d. Butterworth's Workmen's Compensation Cases, begun in 1915 and succeeding Minton-Senhouse's Workmen's Compensation Cases.

e. Reports of Cases under the Workmen's Compensation Act, and on Insurance Law.
f. There are other collections of reports of special cases, a few still current, but most of them have ceased publication.
g. Smith's Leading Cases. Selected from all topics in the Law and annotated. The ninth American edition was published in 1889.
h. English Ruling Cases. In 26 volumes are collected English cases prior to 1900 deemed by the editors to be leading cases. They are arranged topically and annotated with English and American notes.
i. British Ruling Cases. This is a current series of annotated cases from 1900 to date, containing cases which its editors believe to be of general interest and importance from England, Ireland, Scotland, Canada, Australia and New Zealand.

E. Reports of Judicial Decisions of Other Parts of British Empire.

1. *A list of reports of the Courts of Ireland, Scotland, and Canada and Canadian Provinces will be found in Hicks, 547-555.*

2. *Reports of Australian Courts.*
   a. Commonwealth Law Reports reporting decisions of the High Court of Australia.
   b. Each of the following states has reports bearing the name of the state, in much the same manner as the states of the United States, namely, New South Wales, Victoria, Queensland, South Australia, West Australia, Tasmania.

3. *Reports of New Zealand Courts.*
   a. These decisions are reported in New Zealand Law Reports.

Books of Secondary Authority

A. Digests. A digest of a volume of reports or of a set of reports is an elaborate index to that volume or set.

1. *American Digests, General.*

Until about the middle of the nineteenth century there were no respectable digests of American case law as a whole. Dane's Abridgement, published in 1823-1824, was a hybrid of digest and commentary confined for the most part to the law of the Federal Courts and of Massachusetts. In 1848 the United States Digest

began publication and continued till 1871, digesting decisions from 1847 to 1869. In 1874-1876 Abbott's United States Digest of cases from 1790 to 1869 in fourteen volumes was published. This was followed by United States Digest, New Series, brought out annually, till merged in the American Digest in 1887. The Complete Digest which began in 1887 was combined with the American in 1890; and the General Digest which commenced in 1890 continued publication till 1907. Since that date the American Digest System has been without competition. It now consists of:

a. Century Digest, classifying and abstracting decisions of appellate courts from 1658 to 1896.
b. First Decennial, 1896-1906.
c. Second Decennial, 1907-1916.
d. American Digest, Key Number Series, 1917 to date.
e. American Monthly Digest.

It has been said that the entire body of American Case Law is digested in the American Digest System; and certainly it surpasses in thoroughness and accuracy all its predecessors. Considering the fact that in 1921 it contained approximately 4,000,000 digest paragraphs, it is fair to assume that every case decided by a court of last resort in this country is somewhere represented. But as it consists of a collection of headnotes or syllabi of the cases arranged according to a fixed classification, it is obvious that it can be complete and accurate only to the degree of completeness and accuracy which the headnotes or syllabi possess; and it is common knowledge in the legal profession that headnotes vary in completeness and accuracy with the skill and ability and disposition of their authors, whether they be judges, court reporters or members of the publisher's editorial staff. Consequently while this digest may be an index to all the American cases, it has not only the unavoidable deficiencies of every index, but also the imperfections involved in sometimes accepting ready-made headnotes as statements of the essentials of a decision.

2. *American Digests, Special.*

a. In almost every state there exists a digest of the reports of that state, sometimes called by the name of the state, as the California Digest, sometimes called by the name of the compiler, as Dunnell's Digest (Minnesota). Some of these are

made after the plan of the American Digest System; others are encyclopaedic in form.

b. Digests of the various parts of the National Reporter System.

c. Digests of the various sets of selected cases.

d. Digest of United States Supreme Court Reports, Lawyers' Ed.

3. *English Digests.*

a. Early Abridgments.

(1) Statham's Abridgment, believed to have been first printed about 1490. It contains abstracts of cases down to the end of Henry VI's reign (1422-1461). Many of them are not to be found in any published Year Book. A modern edition in two volumes with English translation was produced in 1915 by Margaret C. Klingelsmith.

(2) Fitzherbert's Abridgment, published in 1514, abstracting cases to the 21st year of Henry VII (1496-1497).

(3) Brooke's Abridgment, published in 1568. It is based largely on Fitzherbert, but abstracts cases down to the year of Brooke's death, 1558.

(4) Hughes' Abridgment, published 1660-1662, is a supplement to Brooke, abstracting cases from 1558 to 1660.

(5) Rolle's Abridgment, published in 1668, edited by Sir Matthew Hale. The following from Hale's preface will suffice to describe it: "This ensuing book is a collection of divers cases, opinions and resolutions of the common law, digested under alphabetical titles and those titles subdivided into heads and paragraphs. . . . But the principal matter of the book consists of collections out of the Year Books, and the latter reports formerly printed out of private reports of other men, and some of the collector's own taking, which were most in the king's bench from about 12 Jacob. regis; there is little in it touching pleas of the crown. It is true, the reader will find many of the cases reported in books lately printed, especially

in Mr. Justice Croke's and Sir Francis Moore's Reports."

(6) Viner's Abridgment, published 1742-1756, in twenty-three volumes. The most ambitious of the abridgments, very carefully edited.

(7) Coventry and Hughes' Analytical Digested Index to the Common Law Reports, published in 1827 and digesting cases from 1216 to 1760.

b. Modern Digests. After Coventry and Hughes, there were several digests of Common Law Cases, and Edward Chitty's Index to Cases in Equity and Bankruptcy, but the only modern digests of importance are

(1) Mews, Digest of English Case Law. Publication was begun in 1898. It digests cases in law and equity, but omits cases which its editors deem of no present value. The original work is in sixteen volumes. Annual supplements keep it up to date.

(2) Butterworths' Ten Year Digest (1898-1907) and Butterworths' Yearly Digest from 1908 to date.

(3) English and Empire Digest. Begun in 1919 and in progress of publication. In May, 1926, twenty-six volumes covering "A" to "Highways, Streets and Bridges" had been published. It purports to be "a complete digest of every English case reported from early time to the present day, with additional cases from the courts of Scotland, Ireland, the Empire of India, and the Dominions beyond the sea."

(4) Law Reports Digests, published by the incorporated Council of Law Reporting, digesting from 1865 to 1912 only those cases reported in "The Law Reports" and "Weekly Notes," and thereafter including other English cases and selected cases from Scotland and Ireland:

(a) Consolidated Digest (1865-1890).
(b) Decennial Digest (1891-1900).
(c) Ten Years' Digest (1901-1910).
(d) Ten Years' Digest (1911-1920).
(e) Annual Digests with quarterly cumulative supplements to date.

Generally speaking the English digests are not as well done as the American in substance or in form. They do not so thoroughly analyze the cases digested or present so detailed a classification, nor do they furnish such effective mechanical aids to one attempting to make an exhaustive search of the decisions.

B. Encyclopaedias.

An encyclopaedia of law, or of a particular department of the law, is an alphabetically arranged collection of treatises, each constructed according to a uniform plan and each treating a single topic the limits of which are so prescribed that the treatises will not overlap and that taken together they will cover the entire field of law or of that particular department of the law. Each such treatise ought to be more than an assemblage of "headnotes arranged horizontally."[14] "The true type of encyclopaedic writing demands a text which consists of a statement of the law as it is deduced from all the authorities by which such law has been established, supported by the citation of all such authorities. . . . the true type of encyclopaedia is primarily concerned with the underlying principles and hence must consider carefully and show the interrelationship of all cases having to do with the principle or rule of law under investigation." Thus speaks an associate editor of a current encyclopaedia.[15] But certainly this is a counsel of perfection, and but seldom exemplified in practice. Some of the articles in encyclopaedias show that their writers had a real understanding of the cases cited; others indicate only a speaking acquaintance with the headnotes. The same article is frequently reliable in some parts and totally untrustworthy in others. The encyclopaedia is often very helpful in furnishing a general survey of a topic or a portion of a topic, but its chief function is that of the digest. It is a valuable tool in the search for applicable judicial precedents; but no statement in it should be accepted at its face value until verified by the decisions cited to sustain it.

1. *American Encyclopaedias.*

a. American and English Encyclopaedia of Law (1st ed., 1887-1896), published in 29 volumes and index, covering substantive law and evidence.

14 See Zechariah Chafee, Jr., in 30 Harv. L. Rev. 300.

15 Kiser, Principles and Practice of Legal Research, 2.

b. American and English Encyclopaedia of Law (2d ed., 1896-1905), published in 30 volumes and index, with a five-volume supplement (1905-1908), covering substantive law and evidence.

c. Encyclopaedia of Pleading and Practice (1895-1902), published in 22 volumes and index, with a four-volume supplement (1903-1909), treating procedural law in such a manner that in combination with the second edition of American and English Encyclopaedia of Law, the whole field of law was covered.

d. Encyclopaedia of Forms and Precedents (1896-1904), published in 18 volumes.

e. American and English Encyclopaedia of Law and Practice. Publication was begun in 1909 but only five volumes covering A-Assignment were produced.

f. Cyclopaedia of Law and Procedure. Cyc (1901-1912), published in 40 volumes. Cumulative Annual Supplements have been issued since 1901.

g. Corpus Juris. This is really a new edition of Cyc and designed to replace it. On the whole it is much better done. Publication was begun in 1914; 40 volumes have been produced, and it is announced that it will be completed in 70 volumes. Supplementary volumes are issued periodically to keep the citations up to date and to permit necessary additions to the text.

h. Standard Encyclopaedia of Procedure (1911-1922), published in 26 volumes. Periodical supplements are issued.

i. Encyclopaedia of Evidence (1902-1909), published in 14 volumes. One-volume supplement in 1919.

j. Ruling Case Law (1914-1921), published in 28 volumes, with a five-volume supplement (1921-1925). Its publishers assert it to be "at once a digest of particular reports and a compendium of the entire body of the law as developed by United States Supreme Court Reports, Lawyers' Edition, American Law Reports Annotated, Lawyers' Reports Annotated, American Decisions, American Reports, American State Reports, American and English Annotated Cases, American Annotated Cases, English Ruling Cases and British Ruling Cases." As a cyclopaedic digest of the reports named, it is valuable and useful in that it makes largely unnecessary the handling of the digests of the separate sets. As

"a compendium of the entire body of the law, etc.," it is of comparatively small value and is to be used with caution.

2. *English Encyclopaedias.*

a. Encyclopaedia of the Laws of England (1st ed., 1897-1898), published in 12 volumes, with a one-volume supplement 1903. It is a mere cyclopaedic digest.

b. Same (2d ed., 1906-1909), published in 15 volumes, with a one-volume supplement in 1913 and a one-volume supplement in 1918.

c. Halsbury's Laws of England (1907-1917), published in 31 volumes, with periodically revised supplement. The form of this work is similar to that of the American encyclopaedias.

d. Encyclopaedia of Forms and Precedents (1902-1909), published in 17 volumes.

C. Text Books or Treatises.

Text books and treatises exist in every degree of merit and of usefulness. Some are still, and others in the past have been, considered to be practically authoritative expositions of the law as it was when they were written. For example, Glanvill is commonly accepted as conclusive, for the original sources from which he formulated his statements are largely unavailable. The same is true of much of Bracton. Britton and Fleta, drawn largely from Bracton, are not so unreservedly accepted. Littleton's Tenures is still highly esteemed, and the writings of Lord Coke, while no longer regarded as the pronouncements of an ultimate authority, are generally greatly respected. Indeed, most of these treatises are usually accorded almost equal respect with judicial precedents.

Next in order comes a class of books which have had great influence on the development of the law, like Blackstone's Commentaries, Kent's Commentaries, the works of Story, and Cooley's Constitutional Limitations. Contemporary books in the same category are Gray on the Rule against Perpetuities, Wigmore on Evidence and Williston on Contracts. In such treatises the writers attempt not only to make a clear and intelligible statement of the existing state of judicial opinion, but also to examine critically the grounds upon which it rests and to formulate their own reasoned conclusions as to what it ought to be. These

books represent the results of a lifetime of scholarly research and real thought, and have more inherent worth than the decisions of the vast majority of our too busy courts. Though, under the doctrine of *stare decisis,* they have not the authority of judicial precedent, their influence in shaping the law may safely be said to exceed that of the reported decisions of very many of our appellate tribunals.

But unfortunately it must be said that the vast majority of text books are net in this class. The better of them do serve a useful purpose similar to that of an article in a standard encyclopaedia, but many of them are a pure waste of good white paper. At best they merely give the reader a starting point in his search for authorities with a very general survey of the topic in question; and often they mislead him as to the state of law and delay him in finding the applicable precedents. The student should get familiar with the names of the better texts and treatises, so as to avoid wasting time and labor on the others.

D. LAW DICTIONARIES.

There is a long line of English Law Dictionaries beginning in 1538 with Rastell's Expositiones Terminorum Legum Anglorum and ending for the present with Byrne's Dictionary of English Law in 1923. American dictionaries commence with Bouvier's Law Dictionary in 1839, and the latest first edition is Pope's Legal Definitions, Words defined by the Courts, 1920. It is important to observe that many of these works do not purport to give the usually accepted meanings of words or of phrases, but merely collect definitions which the courts or legislatures have made, and such definitions must be read in the light of the context. They can never be relied upon as determining the general legal meaning of a word or term. Important modern dictionaries are

1. *American.*
   a. Bouvier, Law Dictionary and Concise Encyclopedia (Rawle's Third Edition), 1914.
   b. Ballentine, Law Dictionary, 1923 ed.
   c. Black, Law Dictionary, 1910 ed.
   d. Judicial and Statutory Definitions of Words and Phrases, commonly known as "Words and Phrases." (1st series in 8 volumes, 1905; 2d series in 4 volumes, 1914.)

2. *English.*
   a. Byrne, Dictionary of English Law.
   b. Mozley and Whitely, Law Dictionary (1923 ed.).
   c. Stroud, Judicial Dictionary of Words and Phrases Judicially Interpreted (ed. 1903-1909 in four volumes).
3. *Australia.*
   Bedwell, Australasian Judicial Dictionary, 1920.
4. *Canada.*
   Widdefield, Words and Phrases Judicially Defined, 1914.
5. *South Africa.*
   Bell, South African Legal Dictionary, 1910.

E. Legal Periodicals.

"For ten and twenty years past," says Professor John H. Wigmore, "there have been at the service of the profession more than a dozen legal periodicals, publishing the weightiest critiques of current legal problems."[16] And besides this number there have been many more, some of them of doubtful value, and others practically worthless as contributions to legal learning or scholarship. In the use of law magazines the same painstaking discrimination is necessary as in the use of treatises and of articles in legal encyclopaedias. The standing of the publication, the learning and ability of the writer, the authenticity of his data, the inherent reasonableness of his deductions in the light of legal history, existing social conditions and the known truths of all sciences affecting human conduct, all these must be carefully weighed in attempting to place the proper value upon legal periodical literature.

A brief history of legal periodicals and a list of them, British and American, will be found in Hicks, Materials and Methods of Legal Research, pages 162-168, 572-609. Among the more important of them now current are

1. *American (General).*
   a. Harvard Law Review.
   b. Yale Law Journal.
   c. California Law Review.
   d. Columbia Law Review.
   e. Illinois Law Review.

[16] Wigmore, Evidence (2d ed., 1923), 115.

f. Michigan Law Review.
g. Minnesota Law Review.
h. University of Pennsylvania Law Review.
i. American Bar Association Journal.

2. *American (Special).*
   a. Journal of American Institute of Criminal Law and Criminology.
   b. American Journal of International Law.
   c. Medico-Legal Journal.

3. *English.*
   a. Law Quarterly Review.
   b. Juridical Review.
   c. Solicitors Journal.
   d. Canadian Bar Review.

F. ANNOTATIONS TO STATUTES AND SELECTED CASES.

In books containing reprints of constitutions, statutes and selected judicial decisions, as pointed out above, there are frequently included as annotations much material by way of digests of previous cases and commentaries thereon.

KEY BOOKS

A. INDEXES.

1. *Descriptive Word Index to Decennial Digest.*

"A compilation of titles under which are references directing the reader to the various topics and sections in the Decennial Digest. These titles are words descriptive of essential facts which have constituted the several elements of the right of action or defense in decided cases. Many of these titles are words that describe, or the names of persons, places, and physical things which have been the subject of dispute. Some of them are words that describe a question of law or fact not directly involving any particular person or thing, but going to particular questions of law and procedure which have been the subjects of dispute, and some of these titles are words that describe a constitutional provision, a legislative act, or a legal doctrine which has been the subject of dispute." Preface, p. IX.

2. *Index and Concordance of Cyc.*

An index of subjects and topics contained in "Cyc" arranged alphabetically.

3. *Index to Notes in Lawyers' Reports Annotated.*
   a. Original volume covers 1 to 70 L.R.A. and 1 to 42 L.R.A. New Series.
   b. Supplement covers 43 L.R.A. New Series to 1916 F, L.R.A., and 3-5 British Ruling Cases.
   c. Triennial Index Digest covers 1915-1917 notes and cases.
4. *Index to notes in Annotated Cases, from 1 Ann. Cas. to 1916 B.*
5. *Index to Notes in American Law Reports, Annotated.*
6. *Common Sense Index to Negligence and Compensation Cases, Annotated.*
7. *List of Important Notes in American Decisions, American Reports and American State Reports.*
8. *Jones and Chipman, Index to Legal Periodicals in four volumes, through 1922.*
9. *American Association of Law Libraries, Index to Legal Periodicals, 1908 to date.* This index is issued quarterly and cumulated annually.
10. *There are also various indexes to statutes, and practically every set of selected cases is furnished with an index or an index-digest.* See also below Shepard's Citations. The above list is not intended to be complete.

B. NOTES ON REPORTED CASES.

1. *Rose's Notes to United States Reports.*

   Issued in 1901 in twelve volumes; revised 1917-1920 in twenty volumes. These are annotations to the decisions of the United States Supreme Court, showing where each decision has been cited by state and federal courts, the point for which cited, and the disposition of that point by the court so citing.

2. *Notes to various state reports.*
   a. Notes on Minnesota Reports. These were published in 1911 and cover volumes 1 to 100 Minnesota Reports. They "trace out every citation of each Minnesota case by any court of last resort in this country, showing how it has been applied, developed, strengthened, limited, or in any way affected by later decisions that have cited it as a precedent."—Preface.
   b. Publication similar to the Notes on Minnesota Decisions are found in several other states, for ex-

ample, by Joseph W. Thompson in Indiana covering from 1 Blackford to 182 Indiana Reports, and 1 to 57 Indiana Appellate Reports, and by Fred P. Caldwell in Kentucky covering 1 to 177 Kentucky Reports.

3. *L.R.A. Cases as Authorities.*

Published in 1913 in six volumes, show where every case in volumes 1-70 L.R.A. has been cited or referred to in any case reported in the United States; also where every L.R.A. case has been cited in any later annotations of Lawyers' Reports Annotated, American State Reports, English Ruling Cases, British Ruling Cases, and United States Supreme Court Reports. They also note the affirmance or reversal of every such case by the United States Supreme Court.

4. *Notes to American Decisions.*

These treat the cases in American Decisions and American State Reports in somewhat the same way as L.R.A. Cases as Authorities treats the cases in L.R.A.

5. *The English and Empire Digest gives with the digest of each case a reference to all subsequent decisions in which such case is cited.*

C. TABLES OF CASES REPORTED, CITED, OVERRULED, ETC.

1. *Tables of Cases Reported and Cited.*

a. Almost every volume and set of reports has a table of cases reported and some have tables of cases cited therein.

b. The American Digest System and most other digests have each a table of cases digested.

c. Most text books have tables of cases cited.

2. *Tables of Cases Affirmed, Modified or Overruled.*

a. In the tables of cases in the American Digest System through the second Decennial, the notation after the particular case indicates the final disposition of that case by the court of last resort. In each yearly volume from 1917 on, there is a separate table of cases affirmed, modified or reversed by decisions digested in that volume.

b. The sixth volume of the Digest of United States Supreme Court Reports, digesting volumes 1-206, has a table showing "all reported cases in state courts or lower Federal courts which have been affirmed or reversed by the Supreme Court of the United States."

c. In several of the states such tables of cases have

been published from time to time; and several state digests contain them. In some volumes of reports, there are tables of cases modified or reversed, by the decisions therein.

D. Citators.

1. *Federal Citations.*

By Ash in four volumes, covering the period from 1789 to 1901. They show where each case decided by the United States District Court, Circuit Court, Circuit Court of Appeals and Court of Claims has been subsequently cited in the United States Supreme Court Reports, Federal Reporter, Federal Cases or state reports, and where cases in the state reports have been cited in the federal reports.

2. *Shepard's Citations.*

This series in conjunction with the Citator, which covers Kansas and Missouri and which it is gradually absorbing, covers the reports of all the courts of the United States, the Reporter System, and the reports of every state except Delaware, Kentucky, Mississippi and Nevada. For each of these states and for the District of Columbia, a Shepard's citation book is in preparation. Each unit is kept up to date by periodical supplements. The scope of the various units is not uniform. For example, the citation book for Connecticut includes citations of all Connecticut cases in the Connecticut Reports, the Federal Reporter, United States Supreme Court Reports and the Atlantic Reporter and in notes in the various series of selected cases, and citations to the Constitutions of the United States and of Connecticut and to the statutes of Connecticut; the citation book for Massachusetts has no citations to the Northeastern Reporter but otherwise is as extensive in scope as the Connecticut book. The citation book for the United States Supreme Court furnishes citations to the United States Constitution, the Revised Statutes of the United States, the Statutes at Large and the rules of court; to the official edition of the United States Supreme Court Reports, the Lawyers' edition thereof and the Supreme Court Reporter; and to decisions of the Court of Claims, and of the various executive departments including the Opinions of the Attorney General. It has also a classified topical index of the case law since 1915 arranged according to the classification of the American Digest System, Key Number Series.

3. *Citer Digest.*

The revised edition of this work was published in 1916 and is kept up to date by cumulative supplements issued in January, May and September. It "shows the history and construction of each act of Congress down to date," giving reference to the Revised Statutes, Statutes at Large, Compiled Statutes and Federal Statutes Annotated, and citing all cases where they have been dealt with by the courts.

HOW TO USE LAW BOOKS

Introductory. When a lawyer or student is confronted with the problem of determining what is the law applicable to a given state of facts, his task is really to predict what the courts will declare to be the legal relations which those facts establish between the parties involved. In the above-described repositories of the law, he will find most of the materials upon which to base his prediction. If valid legislative enactments are applicable, they will normally control. Consequently, in the United States he must first ascertain whether there is any pertinent provision in (1) the Constitution of the United States, (2) any act of Congress or treaty, (3) the Constitution of the state, or (4) any enactment of the state legislature or any subordinate legislative body. In England, he will not be troubled with written constitutional provisions but must look to the enactments of Parliament and subordinate bodies. If any such applicable provision is found, he must inquire how, if at all, it has been interpreted by the courts. If there is no constitutional or statutory provision in point, then he must seek out judicial precedents upon the same or analogous facts. In this process, he must at the outset carefully analyze the problem so as to have clearly in view the exact question which it presents.

United States Constitution. Every lawyer and law student should be or become reasonably familiar with the Constitution of the United States, and this will enable him to tell at least whether a constitutional question is likely to be involved in his problem. If he has any doubt about it, a search of the Constitution is imperative. Fairly adequate indexes are available, but the document itself is so brief that even without an index, the applicable section, if any, may usually be found without undue labor. If

found, its interpretation by the courts may ordinarily be ascertained by the use of the Citer-Digest, Shepard's United States Citations, the Official Annotated Edition of the Constitution published by the Government Printing Office, Volumes 10 and 11 of United States Compiled Statutes and Supplements, Volumes 10 and 11 of Federal Statutes Annotated and Supplements.[17] These will give references not only to all amendments, but also to all judicial decisions wherein it has been authoritatively interpreted, applied or even barely cited, up to the time of the publication of the respective works. But an exhaustive search will not end here. It will include all the steps indicated below in describing the search for judicial precedents and lesser authorities. And in taking such steps the searcher will sometimes be rewarded by finding a constitutional provision having a bearing upon his question, which a reading of the document itself did not suggest.

State Constitution. The lawyer and student should likewise know the Constitution of his own state, and should conduct his quest for an applicable provision in the manner above suggested for dealing with the Federal Constitution. If such a section is found, he may receive help from a local annotated edition which will usually refer him to the decisions of the appellate courts of the state and of the United States Supreme Court. Shepard's Citation Book for the State will perform the same service; but rarely, if ever, will he find such elaborate annotations of a state constitution as those above mentioned for the Federal Constitution. It is, therefore, essential that he continue the search for judicial precedents.

Treaties. The problems involving treaty provisions are comparatively few. No unusual helps are available to the searcher. The collections referred to on the second page of this chapter and the United States Statutes at Large must be consulted. But much, if not most, reliance must be placed upon a search for judicial precedents. A list of cases decided by the United States

17 In the paragraphs below dealing with judicial precedents, the method of using such books is explained in detail. Much of the information there given as to the process of investigation is applicable also to statutory law.

Supreme Court dealing with treaties will be found in Volume 6 of the Digest of United States Supreme Court Reports, Lawyers' edition.

Acts of Congress. Whenever a problem lies in the field open to Congressional legislation, it cannot safely be assumed that Congress has not acted. The body of Congressional legislation is so large that the searcher cannot hope to examine all the text; he is forced to have recourse to an index. Indexes generally vary in quality from very bad to fairly satisfactory. Their accuracy and completeness depend largely upon the education, diligence, imagination and general intellectual ability of their makers. A lawyer might reasonably expect to find a decision dealing with the constitutionality of a statute regulating the sale of oleomargarine indexed under constitutional law, but an indexer might, as indeed one official indexer did, omit it under that heading and put it only under oleomargarine. The searcher must, therefore, try to put himself in the place of the indexer and conjure up every word and phrase which the subject matter might suggest. Among other things he should look for words and phrases descriptive of the physical thing involved, of the status, condition, occupation, or relationship of the parties; of the right, privilege, power, immunity or disability in question; of other legal concepts, doctrines or mandates suggested by the problem; of the wrong or injury alleged; of the pertinent grounds of defense and of the appropriate or desired relief. If he finds a pertinent enactment, then he may proceed, as above suggested in case of a constitutional provision, with the United States Compiled Statutes, Federal Statutes, Annotated, and Shepard's Citation Book, and complete the investigation as outlined below by a search for judicial precedents and lesser authorities.

State Legislation. It would be almost safe to say that the investigation of every legal problem should begin with a search for pertinent state legislation, for no one can, by *a priori* reasoning, form a reliable opinion as to whether a legislature has enacted a regulation upon any given subject. Here too the body of statute law is so great that reliance upon an index is imperative. The process is similar to that used in seeking an applicable Congressional act. Compilations, consolidations, revisions and

codes, where available, as well as session laws must all be scrutinized. If a relevant statute is discovered, its legislative and judicial history may be indicated in an annotated edition of the statutes; and Shepard's Citation Book for the state will usually give references to amendments and repeals and to the judicial decisions which in any way refer to the statute. But because of the inadequacy of most indexes, the investigation should be carried through by a search for judicial precedents and lesser authorities.

Enactments of Subordinate Bodies. The field for such enactments is comparatively narrow. Ordinances and resolutions of legislative bodies of municipalities (*e. g.* boards of aldermen or city councils), and regulations of boards of health are examples. The process of search is similar to that for state legislation. But very infrequently will any annotated edition of such local legislation be available. Reliance must be largely placed upon an investigation for judicial precedents and lesser authorities.

Judicial Precedents and Lesser Authorities. It will be assumed that a systematic and exhaustive investigation of the authorities is desired and that it is to be made by a beginner. Even such an inquirer will be able to analyze his problem sufficiently to tell whether it lies in the field of contracts, crimes or torts and to determine in what general text books it will be treated. It is believed that the books can be most profitably consulted in the following order: (1) text books or treatises, (2) encyclopaedias, (3) digests, (4) series of selected cases, (5) citation books, (6) periodicals, (7) tables of cases. In handling these books it must be constantly borne in mind that a classification of legal materials varies with the purpose it is designed to accomplish as well as with the ability of the classifier. It must not be expected that a text book or encyclopædia will adopt a classification suited to a law school curriculum, or that a digest will arrange its materials to fit the notions of a law teacher or text writer. No existing classification exhibits evidence of divine inspiration or even of perfect human wisdom. The searcher must use his imagination and attempt to get the point of view of the author of the particular classification under examination.

Same—Text Books. After the problem has been analyzed as accurately as possible, an "index list" of apposite words and phrases should be made, under which it is thought an indexer might possibly classify materials dealing with the question, as suggested above under "Acts of Congress." From the treatises upon the appropriate subject there should be selected, if possible, the latest edition of several standard texts. It may be difficult to secure any reliable evaluation of a text book, but ordinarily an inquiry of a law librarian, a practitioner or a law teacher will procure sufficiently accurate information. In the use of a treatise the first step is an examination of the table of contents to ascertain the manner in which the author divides and subdivides his subject, with a view to finding in what subdivision he treats the question under investigation. Next, the index should be scrutinized for the selected words and phrases. If the book treats the question at all, the appropriate passages in the text should be thus revealed. The investigator should (1) accurately note the subdivisions or titles under which the pertinent points are discussed and add to his list of index words and phrases any new classificatory words or phrases, for use in his further search; (2) note upon a separate card or slip of paper (hereinafter called the case card) the name and citation of each case relied upon by the author, with a brief memorandum of the point for which it was cited and the exact place in the work where it is cited; (3) record on a separate card of different color (hereinafter called text card) the opinion of the author. Cards of this color should be used for the opinions of text-writers, commentators and editors upon the question. The case cards and text cards should be separately arranged in alphabetical order for comparison with citations later found to prevent duplication.

Same—Encyclopaedias. As it is usually unprofitable to examine the older encyclopaedias where current ones of equal merit are available, the present suggestions are directed only to the use of "Corpus Juris-Cyc." The publishers of these works issue a law chart which shows their scheme of classification. The field of the law is divided into seven grand divisions, namely, Persons, Property, Contracts, Torts, Crimes, Remedy and Government. Each grand division has a number of subheads, and under each subhead are many topics. Each topic is the title of an article or

treatise in Corpus Juris or the Cyclopedia of Law and Procedure. At the head of each such treatise is a detailed analysis of its contents, and a table of cross-references to other articles treating related subjects. The "Index and Concordance of Cyc" serves as an index to the Cyclopedia of Law and Procedure, and once a reference to that work is found, it is readily translated into the proper reference to Corpus Juris by the parallel reference tables in each volume of Corpus Juris.

The analysis originally made, of itself or at any rate with the information gleaned from the text books, should enable the searcher to decide within which grand division his problem falls; at the very least it will enable him to eliminate the most of them. The subheads in the division or divisions thus selected must then be examined to ascertain under which the question in hand is most likely to be treated. This determined, the topics under the chosen subheads must be searched to find those most apt to contain pertinent matter. Next the volumes of Corpus Juris or Cyc containing these topics must be consulted, and the analysis and table of cross-references at the head of each treatise or article scrutinized. By this process all relevant matter will usually be found. If not, and as an additional safeguard in any event, the Index and Concordance of Cyc should be carefully scanned for the words and phrases in the investigator's index list. Any material referred to under such words and phrases, as well as that previously found, should be attentively read and analyzed. These volumes of Corpus Juris or Cyc will refer, of course, only to those cases which had been reported up to the date of the compilation of the text for the press. To find the later cases recourse to the Annotations to Cyc or to Corpus Juris-Cyc is necessary. At the top of each page of these books is printed the number of the volume of Cyc or Corpus Juris thereon annotated, and at the left of each paragraph the number of the page of that volume followed by the number of the note. New matter is inserted wherever necessary and is indicated by giving a fractional number to the note and preceding the text by the word "new." The later cases are cited under their appropriate note numbers. Case cards, text cards and classification memoranda should be made, as in dealing with text books. If a case is found for which the searcher already has a case card, he should note the new citation

on the case card. It is advisable also to take the name of the writer of the article; it may aid in evaluating the opinion.

In this connection a word of caution is needed. The publishers of Corpus Juris, in stressing the value of quotations from opinions in the notes, say that they afford "material for the making of briefs in such form that it may be used without necessity of access to the report of the particular case." Such practice should never be indulged. Nothing could be more unscholarly or more unlawyerlike. The value of such a quotation can never be estimated without a painstaking examination of the original report.

The foregoing method of using Corpus Juris-Cyc may be adapted to the use of any encyclopaedia by substituting for the "law chart" the publisher's scheme of classification, and for the "Index and Concordance of Cyc," the index, which is usually provided, as in volumes 31 and 32 of American and English Encyclopaedia of Law, 2d ed., or volume 28 of Ruling Case Law.

Same—American Digest System. The classification scheme of the American Digest System is almost identical with that of Corpus Juris. It has seven categories corresponding exactly with the seven grand divisions of Corpus Juris. The seven categories are divided into thirty-four divisions, which are subdivided into four hundred thirteen titles. Each title represents a separate topic in the digest under which the pertinent digest paragraphs are arranged in divisions, subdivisions, sections and subsidiary sections, each introduced by a descriptive line. Preceding these paragraphs are, first, a scope note, defining the limits of the topic as treated; second, an analysis of the subject matter; and third, a list of cross-references. By following the scheme above outlined for the use of Corpus Juris, the searcher may find the digest paragraphs bearing upon his question. And with the information he has amassed from the text books and encyclopaedias, he should be able to get satisfactory results by this process without undue expenditure of time. However, on account of the plan which the publishers have devised for their digesters in order to secure as great uniformity of classification as possible, and on account of the mechanical aids which they have provided for the users of the digest, another method of search is ordinarily employed.

The Descriptive Word Index is made up of words and phrases, alphabetically arranged, which constitute or denote or describe each of the 413 topic titles and each descriptive line of divisions, subdivisions, sections and subsidiary sections of the digest; legal mandates, concepts and doctrines whether judge made or drawn from constitutions or legislative acts; persons, natural and artificial, and their class, condition, occupation and relationship; places and things without which the disputes which have been litigated would not have occurred; wrongs and injuries for which relief has been sought in litigation; the different grounds of defense in every action; the various kinds of relief sought or given; every step and the manner of taking it in any action or suit from its commencement in a court of original jurisdiction to its termination in a court of last resort; every step in procuring or attempting to procure the enforcement of any order or judgment of a court. After each such word or phrase reference is made to the paragraph or paragraphs in the First Decennial Digest where decisions dealing with pertinent material are to be found digested. The topic titles and the paragraph numbers (called key numbers) under each of them in the First Decennial are identical with those of all subsequent parts of the system, so that this reference is really to all parts of the American Digest except the Century Edition. And the portion of the Century digesting cases dealing with the same point is ascertained by merely consulting the descriptive line at the head of the section under which the particular paragraph number is found in the Decennial. This contains a reference to the appropriate volume and paragraph of the Century.

In classifying the digest paragraphs the digester is expected to do what the publishers think the searcher should do. He should analyze the case as to (1) the parties—their class, condition, occupation and relationship, (2) the place or thing without which the dispute would not have arisen, (3) the wrongful act or injury or the right infringed, (4) the relief asked, (5) the steps in the action as to which some question is raised. This analysis will disclose the descriptive words for each point treated; these words will point to the topic and section line where the paragraph should be put. Accordingly the searcher should make an analysis on this plan. If he has made up his "index list" as suggested above, he will have all the descriptive words which

this analysis will afford and some others. These excess words he should by no means discard, for given exactly the same scheme of analysis and classification, any two persons are likely to reach different results in a large percentage of cases. He should therefore scan the descriptive word index for every word and phrase on his list and make note of every pertinent reference discovered. When his list of such references is complete, he should consult the two Decennials and the Century and read the appropriate sections. To avoid the necessity of handling each of the volumes after the second Decennial, he should examine the Cumulative Table of Key-number Sections, which will disclose the volumes that contain paragraphs under the key numbers on his list of references. The designated sections in these volumes he should read. Finally he should look into the monthly advance sheets of the digest and read all paragraphs therein under the same key numbers. Whenever in this process he finds a paragraph having a bearing on his problem, he should make a case card, unless he already has one for the case thus digested, in which event he should note the digest reference on the old case card.

It will be remembered that these digest paragraphs are merely paragraphs of the headnotes or syllabi of the cases. They should never be relied upon without an examination of the original case.

Same—State Digests. Where the problem is to be solved according to the law of a particular state, the digest for that state, if any, should, of course, be scrutinized. If it is built on the plan of the American Digest System, the scheme above outlined may be employed. If arranged as an encyclopaedia the plan suggested for "Corpus Juris-Cyc" should be used with such modifications as may be necessary. If neither, then all the means above suggested should be combined to locate the pertinent material. If time permits or if authorities in point cannot be otherwise discovered, it may be advisable, if not necessary, to search all available state digests, for often they will reveal relevant cases that a particular searcher can find by no other means. As explained above, the American Digest System is a compilation of headnotes or syllabi; and very often the writer of an encyclopaedic article has no more intimate acquaintance with portions of the case law than that gained by perusing headnotes. A particular digester of state decisions may have pursued the plan of

carefully reading all the opinions in every case and making a digest paragraph or statement as to each point discussed. In such event, his digest will be a mine of otherwise unavailable information.

Same—English Digests. The only practicable method of using these digests is by an adaptation or modification of the first plan suggested for the American Digest System. This requires an acquaintance with the scheme of classification, and an examination of the various divisions, subdivisions, etc., to determine where the question in hand is probably treated.

Same—Series of Selected Cases. Ruling Case Law is an encylopaedic digest of cases and annotations to January 1, 1925, in American Decisions, American Reports, American State Reports, American and English Annotated Cases, American Annotated Cases, English Ruling Cases, Lawyers' Reports Annotated, United States Supreme Court Reports, Lawyers' Edition, British Ruling Cases and American Law Reports Annotated. By familiarizing himself with the classification scheme of the publishers and employing his index list of words and phrases, the searcher should have no difficulty in applying to this digest the plan above described for the use of encyclopaedias. This will give him references to the cases which are reported or cited in annotations in all the volumes of each of the above-named series except the last three, and to all the volumes in those three published prior to January 1, 1925. He should make a list of these references and then examine the appropriate volumes. On this examination he should make a case card for each new case in point, should note appropriate citations on his old case cards, and should record in a text card the opinion of the editor, if any, upon the problem.

Each of the above series has a separate digest or index digest. These digests are not usually as well devised or as intelligently executed as the American Digest System. They are built on the descriptive word plan and sometimes assume to themselves such attractive though meaningless soubriquets as "Common Sense Index" or "Common Sense Digest." In using them the searcher should rely principally upon his index list. They should be examined in addition to Ruling Case Law. For series not covered

by that work, as well as for cases and annotations in United States Supreme Court Reports, Lawyers' Edition, in American Law Reports and in British Ruling Cases since January 1, 1925, these separate indexes or digests must be consulted. In using the digest for American Law Reports Annotated, the searcher should not neglect the cumulative table of supplemental decisions in the back of the annual digests and in separate blue books, which keep the annotations up to date.

In addition to the digest, some of the series have separate Indexes to notes, such as the L. R. A. Desk Book. Sometimes, but not always, all the information contained in these indexes to notes is to be found in the digest, hence it is well to examine such indexes; and on occasion some time may be saved by so doing.

Same—Citation Books. If the searcher has followed directions, he will at this point have a case card for every case bearing upon his problem found in text books, encyclopaedias, digests and series of selected cases. If any of these cases are in the United States Supreme Court Reports, he should now turn to the appropriate volume of Rose's Notes, and find therein all subsequent judicial opinions wherein those portions of such cases bearing on his problem have been dealt with. For each new opinion thus discovered he should make a case card. If there is available any other set of notes similar to Rose's Notes for any other cases on his cards, he should proceed in like manner with them.

Next, he should take advantage of the citation books—Ash's Federal Citations and Shepard's Citation Books. Because most reported cases deal with more than one point, it might cause the searcher undue labor to proceed with these citation books from his cards only. Consequently, it may be advisable for him now to consult the original report for each case card, and note upon such card the paragraph of the syllabus or headnote bearing upon his problem. Then he may for each card turn to the appropriate citation book and secure a reference to all subsequent cases wherein either the pertinent paragraph of the syllabus is treated or the case in general is cited. For each such citation he should make a separate case card.

Same—Periodicals. The searcher's next task is to discover the periodical literature upon his problem. His handling of text

books, encyclopaedias, digests and annotations should have familiarized him with the phraseology used by judges and writers in discussing the question, and his previous analysis and his index list now should give him a key to the indexes of the separate periodicals and to Jones and Chapman's Index and the Index of the Association of Law Libraries. By searching therein for characteristic titles and descriptive words and phrases, he should find references to most, if not to all, periodical discussions of value. He should list all titles which indicate that the articles referred to might be helpful, and then examine the articles. All relevant material thus found should be handled like text book material.

Same—Tables of Cases. The use of the various tables of cases at this point would be unprofitable. The searcher should now read with attention and discrimination every case for which he has a case card; if any such case has in it matter of value, he should make an accurate abstract of it, being vigilant to distinguish between decision and dictum, remembering that a dictum, while not as weighty as a decision, may be of considerable value. If any such case cites or discusses a pertinent case for which he has no case card, he should make such a card for it, and proceed as if it had been found in his search of a digest or text book. By this process he will eliminate all cases of no worth. The case cards for the remaining cases he should then examine to ascertain whether each case has been found in the various text books, digests, selected case series, and other works which he has previously examined and for which a table of cases is available. If any such case was not found in any such work, the table of cases for that work should be scrutinized. This process may result in giving the searcher references to other cases in point or to further discussion or comment of value.

Other Methods of Search. It is thought that the foregoing order of search is well suited for the beginner; and that it will give at least as good results as any other for the experienced practitioner who desires to exhaust the authorities. If one is content to believe the advertisements of every law book publisher, the search of a single encyclopaedia, or of a digest, or the discovery of a note in a series of selected cases will reveal all the law—at least all the law worth considering. Credulity may be a

great labor-saver, but it is not the mark of a lawyer or of a scholar. If the legal authorities are to be exhausted, all the foregoing steps must be taken. It is possible to take them in a different order. One may begin with a series of selected cases; one may have a case in point and work back through the various tables of cases; one may commence with the American Digest System; or with a case that has a key number syllabus paragraph, and thus get a start in the Decennial Digest. Furthermore, the thoroughness of the search to be made in any instance may largely depend upon the books available and the object to be attained. But whatever the extent of such search, it should be made systematically so as to avoid waste motion and unnecessary duplication of work.

Evaluating the Authorities. Besides making an accurate abstract of each case in point and a correct summary of the view of each text writer, commentator and editor, the student or lawyer, in the process of reaching his prediction as to how the courts will solve the problem in hand, must attempt to place proper values upon each such case and view.[18] This involves a consideration of the following questions with reference to each judicial decision. *As to the court,* is it a trial court, an intermediate appellate court or a court of last resort? Is it a court of some obscure jurisdiction where litigation is of an unimportant character and the bench and bar poorly educated; or is the court so overcrowded with work that it habitually or frequently renders opinions without thorough and scholarly investigation, or is it a court of high reputation? Is the judge who rendered the opinion of recognized learning and ability, or is he "famously ignorant"? *As to the report,* is it official and accurate; is it the only report of the case or are there several reports; if there are several, do they disagree as to the pertinent point; what is the reputation of the reporter for accuracy; is the report full and detailed, or a mere memorandum or note? Was the case thoroughly argued by able counsel on both sides, or was there an appearance for one side only, or was it submitted without adequate argument? *As to the opinion,* is it, upon the problem in hand, decision or dictum; is it well reasoned and fortified by the authority of prior judicial decisions; does it consider prior perti-

[18] See Wambaugh, The Study of Cases, 42-46.

nent cases within and without the jurisdiction, or does it rely upon generalities from an encyclopaedia, or upon unscholarly text writers; does it fail to notice a point which might have been material; is it by a unanimous or by a divided court; if there is more than one opinion, do they agree in reasoning as well as in result? *As to its non-judicial setting,* may the decision be attributed to peculiar political, economic or social conditions temporarily existing in the jurisdiction at the time of its rendition, or may it have been influenced by the particularly distressing or appealing or otherwise peculiar facts of the case? *As to its judicial history,* was it a case of first impression; has it been modified or overruled or doubted or affirmed by later cases; has it been ignored or frequently cited; is it in accord with the trend of modern decisions in the same and other jurisdictions? *As to its present applicability,* have newly discovered truths made the decision inapplicable or impaired the foundation upon which it rests; have changed and changing notions of what sound social policy demands made the result of applying it shocking or undesirable or of doubtful utility?

In evaluating the opinions of editors and commentators, the education, experience, political, economic and social background, and the professional standing of the writer must be weighed. Investigation must be made to determine whether the work shows scholarly research and intelligent interpretation of the authorities; whether the views expressed are the result of fair and impartial examination of judicial decisions and other pertinent authorities, or are merely preconceived theories which the authorities have been tortured to support; and whether they accord with what modern decisions show to be the prevailing ideas of the courts as to sound social policy. After having thus collected and evaluated the authorities, the searcher will be in as favorable a position as possible to make an intelligent prediction as to what solution the courts will make of his problem.

APPENDIX

REPLEVIN

Writ

The King to the Sheriff, Health:

I command you, that justly and without delay, you cause G to have his beasts by gage and pledges, of which he complains that R has taken them, and unjustly detains them for the customs which he exacts from him, and which he does not acknowledge to owe him; and in the meantime, cause him justly, etc., least, etc." Glanville (Beale's edition of Beames), 238.

The King to the Sheriff, etc.: We command you that justly and without delay, you cause to be replevied the cattle of P, which D took and unjustly detains, as it is said, and afterwards thereupon cause him justly to be removed, that we may hear no more clamour thereupon for want of justice, etc.

Pledges .....

(Fitzherbert Natura Brevium 68 D.)

N. B. In the classic period of common law procedure replevin was begun by plaint rather than by original writ.

Declaration

In the Common Pleas.

Hilary Term in the fourth year
of the reign of King .....

Middlesex, to wit: D, the defendant in this suit, was summoned to answer P, the plaintiff in this suit, of a plea wherefore he took the cattle of the said P and unjustly detained the same against sureties and pledges until, etc., and thereupon the said P, by A, his attorney, complains: For that the said D, on the .... day of ....., in the year of our Lord ....., in the parish of X in the County of Middlesex in a certain close there, called Blackacre, took the cattle, to wit, seven milch

cows, of the said P of the value of one hundred pounds, and unjustly detained the same, against sureties and pledges, until, etc.—Wherefore the said plaintiff saith, that he is injured and hath sustained damage to the amount of fifty pounds, and therefore he brings his suit, etc.

DEBT

Writ

The King to the Sheriff of Middlesex, Greeting:

Command D, that justly and without delay he render to P the sum of one hundred pounds of good and lawful money, which he owes to and unjustly detains from him, as he says. And unless he shall do so, and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners the said D that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show why he hath not done it; and have you there the (names of the) summoners and this writ.

Witness, etc. .....

Declaration on simple contract

In the King's Bench.

Hilary Term in the fourth year
of the reign of King .....

Middlesex, to wit: D was summoned to answer P of a plea that he render to the said P the sum of one hundred pounds of good and lawful money, which he owes to and unjustly detains from him. And thereupon the said P, by A, his attorney, complains: For that whereas the said D heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, was indebted to the said P in the sum of one hundred pounds of lawful money, for divers goods, wares and merchandise, by the said P before that time sold and delivered to the said D at his special instance and request, to be paid by the said D to the said P when he, the said D, should be thereto afterwards requested; whereby, and by reason of the said last mentioned sum of money, being and remaining wholly unpaid, an action hath accrued to the said

P to demand and have of and from the said D the said sum of one hundred pounds above demanded, yet the said D (although often requested) hath not as yet paid the said sum of one hundred pounds above demanded, or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses to the damage of said P of fifty pounds, and therefore he brings his suit.

Declaration on a bond

Same as above through the word "complains," then continue: For that whereas the said D heretofore to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, by his certain writing obligatory, sealed with his seal, and now shown to the court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said P in the sum of one hundred pounds above demanded to be paid to the said P; yet the said D (although often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said P of fifty pounds; and therefore he brings his suit.

Declaration on a record

Same as declaration on simple contract through the word "complains": For that whereas the said P, heretofore, to wit, in the Hilary Term in the first year of the reign of our Lord the now King, in the court of our said Lord the King, before the King himself at Westminister in the County of Middlesex, by the consideration and judgment of the said court, recovered against the said D the said sum of one hundred pounds above demanded, which in and by the said court were then and there adjudged to the said P for his damages, which he had sustained as well by reason of the non-performance by the said D of certain promise and undertaking then lately made by the said D to the said P, as for his costs and charges, by him about his suit in that behalf expended, whereof the said defendant was convicted, as by the record and proceedings thereof, remaining in the said court of our said Lord the

King, before the King himself more fully appears; which said judgment still remains in full force and effect, not reversed, satisfied, or otherwise vacated; and the said P hath not obtained any execution or satisfaction of or upon the said judgment so recorded as aforesaid; whereby an action hath accrued to the said P to demand and have, of and from the said D the said sum of one hundred pounds above demanded; yet the said D (though often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof to the said P, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said P of fifty pounds, and therefore he brings his suit.

Declaration on a statute

Same as declaration on simple contract through the word "complains": For that the said D within three months next before the commencement of this suit, to wit, on the .... day of ....., ... in the year of our Lord ....., at M, in the County of Middlesex, was indebted to the said P in the sum of one hundred pounds of lawful money, by force of the Statute made and passed in the 9th year of the reign of our late Queen Anne, entitled "An act for the better preventing of excessive and deceitful gaming," being money then and there lost and paid by the said P to the said D, and by the said D then and there won of the said P, by playing with dice at a certain unlawful game, commonly called or known by the name of French hazard, at one sitting, contrary to the form of the Statute in such case made and provided, whereby and by force of the Statute, an action hath accrued to the said P, to demand and have of and from the said D the said sum of one hundred pounds above demanded; yet the said D (though often requested) hath not as yet paid the said sum of one hundred pounds above demanded or any part thereof to the said P, but so to do hath hitherto wholly refused, and still refuses to the damage of said P of fifty pounds, and therefore he brings his suit.

DETINUE

Writ

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he render to P certain goods and chattels of the value of one hundred pounds of

lawful money, which he unjustly detains from him, as he says. And unless he shall do so, and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners the said D that he be before us in eight days of St. Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the (names of the) summoners and this writ.

Witness, etc. .....

Declaration

In the King's Bench.

Hilary Term in the fourth year of the reign of King .....

Middlesex, to wit: D was summoned to answer P of a plea that he render to the said P certain goods and chattels of the value of one hundred pounds, of lawful money, which he unjustly detains from him. And thereupon the said P, by A, his attorney, complains: For that whereas the said P, heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, delivered to the said D certain goods and chattels, to wit, seven milch cows, of great value, to wit, the value of one hundred pounds of lawful money, to be redelivered by the said D to the said P when he, the said D should be thereto afterwards requested; yet the said D although he was afterwards, to wit, on the .... day of ....., in the year aforesaid, in the County aforesaid, requested by the said P so to do, hath not as yet delivered the said goods and chattels, or any part thereof, to the said P, but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said P, to wit, at M aforesaid, in the County aforesaid, to the damage of the said P of fifty pounds; and therefore he brings his suit, etc."

COVENANT

Writ

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he keep with P the covenant made by the said D with the said P according to the force, form and effect of a certain indenture in that behalf made between them, as he says. And unless he shall do so,

and if the said P shall make you secure of prosecuting his claim, then summon, by good summoners, the said D that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there (the names of) the summoners, and this writ.

Witness, etc. .....

Declaration

In the King's Bench.

Hilary Term in the fourth year of the reign of King .....

Middlesex, to wit: D was summoned to answer P of a plea that he keep with him the covenant made by the said D with the said P according to the force, form and effect of a certain indenture in that behalf made between them. And thereupon the said P, by A, his attorney, complains: For that whereas, heretofore, to wit, on the .... day of ....., in the year of our Lord ....., at M, in the County of Middlesex, by a certain indenture then and there made between the said P of the one part and the said D of the other part (one part of which said indenture, sealed with the seal of the said D, the said P now brings here into Court, the date whereof is the day and year aforesaid), the said P for the consideration therein mentioned did demise, lease, let and to farm let unto the said D a certain messuage or tenement in the said indenture particularly specified, to hold the same with the appurtenances, to the said D, his executors, administrators and assigns, from the tenth day of May next ensuing the date of said indenture, for and during, and unto the full end and term of one year from thence, next ensuing, and fully to be complete and ended, at a certain rent payable by the said D to the said P as in the said indenture is mentioned. And the said D for himself, his executors, administrators and assigns did thereby covenant, promise and agree to and with the said P, his heirs and assigns (among other things) that he, the said D, his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement in good and tenantable

repair, order and condition; and the same messuage or tenement and every part thereof should and would leave in such good repair, order and condition at the end or other sooner determination of the said term, as by the indenture, reference thereunto being had, will, among other things, fully appear. By virtue of which said indenture the said D afterwards, to wit, on the tenth day of May, in the year aforesaid, entered into the said messuage or tenement, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said P hath always, from the time of the making of the said indenture hitherto, done, performed and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet protesting that the said D hath not performed or fulfilled anything in the said indenture contained on his part and behalf to be performed and fulfilled, in fact, the said P saith that the said D did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement in good and tenantable repair, order and condition and leave the same in such repair, order and condition at the end of the said term; but for a long time, to wit, for the last six months of the said term did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof, ruinous, in decay and out of repair, for want of necessary reparation and amendment; and the said D left the same, being so ruinous, in decay and out of repair as aforesaid, at the end of said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the said P saith that the said D (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same; and to keep the same with the said P hath hitherto wholly refused and still refuses, to the damage of the said P of fifty pounds, and therefore he brings his suit.

ACCOUNT

Writ

The King to the Sheriff of Middlesex, Greeting:

Command D that justly and without delay he render to P his reasonable account concerning the time in which he was his bailiff in T and the receiver of the monies of him, the said

P, as he says. And unless he shall do so and if the said P shall make you secure of prosecuting his claim, then summon him, by good summoners, that he be before our justices at Westminster (on such a day) to show wherefore he has not done so. And have there the (names of the) summoners and this writ.

Witness, etc. .....

Declaration

In the Common Pleas.

Hilary Term in the ..... year of the reign of King .....

Middlesex to wit: D was summoned to answer P of a plea that he render to the said P a reasonable account of the time in which he was the bailiff of the said P in T and the receiver of the monies of him, the said P. And thereupon the said P, by A, his attorney, says that whereas the said D was for a long time, to wit, from the first day of May in the year of our Lord ....., until the first day of December, in the year of our Lord ....., the bailiff of the said P, to wit, at T in the parish of M, in the County of Middlesex, and during that time had the care and administration of divers goods and merchandise of the said P, that is to say, twelve chests of coral beads, containing a large quantity, to wit, three thousand pounds weight of coral beads, of the said P, of great value, to wit, of the value of twelve thousand pounds of lawful money of Great Britain to be merchandized and made profit of for the said P, and to render a reasonable account of the same to the said P, when he, the said D, should be afterwards thereto required; yet the said D hath not rendered a reasonable account of the same to the said P but hath hitherto altogether refused and still doth refuse so to do, to the damage of said P of twelve thousand pounds of lawful money, and therefore he brings his suit, etc.

(Adapted from Godfrey v. Saunders, 3 Wils 73).

TRESPASS

Writ

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put by gages and safe pledges D that he be before us in eight

days of Saint Hilary, wheresoever we shall then be in England, to show wherfore, with force and arms, * he broke and entered the close of the said P, situate and being in the parish of M, in the county of Middlesex, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P there growing, and being of great value,* and other wrongs to the said P there did, to the damage of the said P and against our peace; and have you there the names of the pledges and this writ.

Witness, etc.

(If the trespass were to the person or to chattels, the portion of the writ between the asterisks would be varied accordingly.)

Declaration

In the King's Bench.

Hilary Term in the ..... year of the reign of King .....

Middlesex, to wit: D was attached to answer P of a plea wherefore he, the said D, with force and arms at the parish of M, in the County of Middlesex, broke and entered the close of the said P, situate and being in the parish of M, in the County of Middlesex, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P there growing, and being of great value; and other wrongs to the said P there did, to the damage of the said P, and against the peace of our Lord, the now King. And thereupon the said P, by A his attorney, complains: For that the said D, heretofore, to wit, on the .... day of ....., in the year of our Lord....., with force and arms, broke and entered the close of the said P, that is to say, a certain close called Blackacre, situate and being in the parish aforesaid, in the County aforesaid, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said P, then and there growing, and being of great value, to wit, of the value of one hundred pounds of lawful money, and other wrongs to the said P then and there did; against the peace of our said lord, the King, and to the damage of the said P of one hundred pounds; and therefore he brings his suit, etc.

TRESPASS ON THE CASE

Writ.

If P shall make you secure of prosecuting his claim then put by gages and safe pledges D that he be before us in eight days of St. Hilary, wheresoever we shall then be in England to show wherefore (here insert the words included between the asterisks in the declaration below), as it is said. And have there the (names of the) summoners and this writ.

Witness, etc. .....

Declaration

In the King's Bench.

Hilary Term in the ..... year of the reign of King ....

Middlesex, to wit: P, the plaintiff in the suit complains of D, the defendant in the suit, being in the custody of the Marshal of the Marshalsea of our lord, the now King, before the King himself, of a plea of trespass on the case. * For that whereas the said defendant before and on the ..... day of ....., in the year of our Lord ....., was the possessor and occupier of a certain messuage and premises with the appurtenances, situate in the County of Middlesex, and near to a certain common and public highway there, in which said highway there now is, and before and on the same day and year aforesaid, there was, a certain hole, opening into a certain cellar and vault, of and belonging to the said messuage and premises of the said defendant, to wit, at the parish of T, in the said County of Middlesex. Yet the said defendant, well knowing the premises, whilst he was so the possessor and occupier of the said messuage and premises, with the appurtenances, and whilst there was such hole as aforesaid, to wit, on the day and year aforesaid, at said T in the said County of Middlesex, wrongfully and unjustly permitted the said hole to be and continue, and the same was then and there so badly, insufficiently and defectively covered, that by means of the premises, and for want of a proper and sufficient covering to the said hole, the said plaintiff, who was then and there passing in and along the said highway, then and there necessarily and unavoidably slipt and fell into the said hole, and thereby the left leg of the said

plaintiff was then and there fractured and broken, and he the said plaintiff became and was sick, sore, lame, diseased, and disordered, and so remained and continued, for a long space of time, towit, from thence hitherto, during all which time, he, the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend a large sum, towit, the sum of fifty pounds in and about the endeavoring to get healed and cured of the said wounds, sickness, and disorder, towit at the said T in the said County of Middlesex, to the damage of the said plaintiff of five thousand pounds,* and therefore he brings his suit, etc.

N. B. Note the commencement of the declaration. This was the proper form where the action was begun by Bill of Middlesex. If it was begun by original writ, the form for which is printed preceding the declaration, the commencement was as in the form of declaration in trespass.

TRESPASS ON THE CASE FOR PROMISES

Writ in Special Assumpsit

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put D by gages and safe pledges that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England to show cause wherefore (here insert that portion of the Declaration below, which is included between asterisks) as it is said. And have there the names of the pledges and this writ.

Witness, etc.

N. B.: The above is the form of the writ used in the later common law practice. In the earlier practice the description of the complaint to which defendant must answer was much more general. For example, a sample writ given by Fitzherbert, having the same beginning, and ending as above, has substantially the following between the asterisks. "Whereas he, the said D undertook to make and build three carts for carrying of the victuals and harness of him the said P to parts be-

yond sea, for a certain sum of money, one part whereof he hath beforehand received, within a certain term between them agreed; he, the same D hath not taken care to make and build the carts aforesaid within the term aforesaid, by which he the said P hath wholly lost divers his goods and chattels, to the value of one hundred marks, which ought to have been carried in the carts aforesaid, for the want of the carts aforesaid, to the great damage of him the said P."

Declaration in Special Assumpsit

In the King's Bench.

Hilary Term in the ..... year
of the reign of King .....

Middlesex, towit: D was attached to answer P of a plea of trespass on the case upon promises and thereupon the said P, by A, his attorney, complains: For that * whereas before the making of the promise and undertaking of the said D hereinafter next mentioned, certain differences had arisen and were then depending between the said P and the said D, touching and concerning certain books before then sold by the said D as the agent of and for the said P, to wit, at &c. (venue). And thereupon for the putting an end to the said differences, the said P and the said D, heretofore, to wit, on, &c. (date of submission or about it) at, &c. (venue) respectively submitted themselves to the award of one E. F. to be made between them, of and concerning the said differences; and in consideration thereof, and that the said P, at the special instance and request of the said D had then and there undertaken and faithfully promised the said defendant to perform and fulfill the award of the said E. F. to be so made between the said P and D, of and concerning the said differences in all things therein contained, on the said P's part and behalf, to be performed and fulfilled, he the said D undertook, and then and there faithfully promised the said P to perform and fulfill the said award in all things therein contained, on the said D's part and behalf, to be performed and fulfilled. And the said P in fact saith, that the said E. F. having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on, &c. (date of award or about it) at, &c. (venue) aforesaid, made his certain award between the said P and the said D, of, and concerning the said

differences, and did thereby award 100 pounds to be paid by the said D to the said P, in full satisfaction and discharge of the said matters in difference. Of which said award the said D afterwards, to wit, on the day and year last aforesaid, at &c. (venue) aforesaid, had notice. And although he, the said D, afterwards, to wit, on the day and year last aforesaid, at, &c. (venue) aforesaid, was requested by the said P to pay him the said sum of 100 pounds, according to the tenor and effect of the said award, and his said promise and undertaking; yet the said D not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly to deceive and defraud the said P in this behalf, did not, nor would, on the day and year last aforesaid, or when he was so requested as aforesaid, or at any time afterwards, pay the said sum of 100 pounds, or any part thereof, to the said P, but hath hitherto wholly neglected and refused, and still neglects and refuses so to do, to wit, at, &c. (venue) aforesaid, to the damage of said P in the sum of one hundred fifty pounds,* and therefore he brings his suit.

N. B.: In the older form of declaration after the statement that D was attached to answer P of a plea of trespass on the case upon promises, there was inserted from the writ, that portion beginning "wherefore" and concluding with the word preceding the words "as it is said." See, for example the writ and declaration in Trespass, printed above.

Writ in General Assumpsit

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put by gages and safe pledges D, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore, whereas the said D heretofore, to wit, on the ..... day of ....., in the year of our Lord ....., at M, in the county of Middlesex, was indebted to the said A. B. in the sum of one hundred pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said P before that time sold and delivered to the said P at his special instance and request; and being so indebted, he, the said D, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at M aforesaid, in the county aforesaid, undertook and faithfully promised the said P to pay him

the said sum of money when he, the said D, should be thereto afterwards requested; yet the said D, not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the said P in this behalf, hath not yet paid the sum of money, or any part thereof, to the said P (although oftentimes afterwards requested). But the said D to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said P of one hundred pounds, as it is said; and have you there the names of the pledges and this writ.

Witness,

Declaration in General Assumpsit.

For Goods Sold and Delivered

In the King's Bench.

Hilary Term in the ..... year of the reign of King .....

Middlesex, to wit, D was attached to answer P of a plea of trespass on the case; and thereupon the said P, by A, his attorney, complains: For that whereas the said D heretofore, to wit, on the ..... day of ....., in the year of our Lord ....., at M, in the county of Middlesex, was indebted to the said P in the sum of one hundred pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said P before that time sold and delivered to the said D at his special instance and request; and being so indebted, he, the said D, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at M aforesaid, in the county aforesaid, undertook and faithfully promised the said P to pay him the said sum of money when he, the said D should be thereto afterwards requested. Yet the said D, not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said P in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said P (although oftentimes requested). But the said D, to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said P of one hundred pounds; and therefore he brings this suit, etc.

TRESPASS ON THE CASE

Writ in Trover

The King to the Sheriff of Middlesex, Greeting:

If P shall make you secure of prosecuting his claim, then put D by gages and safe pledges that he be before us in eight days of St. Hilary wheresoever we shall then be in England to show wherefore (here insert that portion of the Declaration below, which is included between asterisks) as it is said. And have there the names of the pledges and this writ.

Witness, etc.

Declaration

In the King's Bench.

Hilary Term in the ..... year
of the reign of King .....

Middlesex, to wit: D was attached to answer P of a plea of trespass on the case, and thereupon the said P by A, his attorney, complains for that * whereas the said P, heretofore, to wit, on, etc., at, etc. (venue), was lawfully possessed, as of his own property of certain goods and chattels, to wit, five black horses of great value, to wit, of the value of fifty pounds, of lawful money of Great Britain. And being so possessed, the said P afterwards, to wit, on the day and year first above mentioned, at, etc. (venue), aforesaid, casually lost the said goods and chattels, out of his possession; and the same afterwards, to wit, on the day and year first aforesaid, at, etc. (venue), aforesaid came to the possession of the said D by finding. Yet the said D well knowing the said goods and chattels, to be the property of the said P, and of right to belong and appertain to him, but contriving, and fraudulently intending craftily and subtly to deceive and defraud the said P in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said P, although often requested so to do; and afterward, to wit, on the day and year last aforesaid, at, etc. (venue), aforesaid, converted and disposed of the said goods and chattels, to his own use. Wherefore the said P saith that he is injured, and hath sustained damage to the amount of fifty pounds,* and therefore he brings his suit, etc.

EJECTMENT

Writ

The King to the Sheriff of Middlesex, Greeting:

If P (John Doe) shall make you secure of prosecuting his claim, then put D, (Richard Roe), by gages and safe pledges that he be before us in eight days of Saint Hilary to show wherefore with force and arms he entered into the manor of M which A demised to the said P (John Doe) for a term which is not yet passed, and the goods and chattels of him the said P (John Doe) to the value of one hundred pounds of lawful money took and carried away and ejected him the said P, (John Doe), from his farm aforesaid and other wrongs to him did to the great damage of him the said P (John Doe).

Witness, etc.

Declaration

In the King's Bench (or "Common Pleas").

..... Term, ... Will. 4.

Middlesex, to wit. Richard Roe was attached to answer John Doe of a plea, wherefore he, the said Richard Roe, with force and arms, &c. entered into the manor of M with the appurtenances, situate and being in the parish of M aforesaid, in the county of Middlesex aforesaid, with the common of pasture thereunto belonging and appertaining which A had demised to the said John Doe for a term which is not yet expired, and ejected him from his said farm; and other wrongs to the said John Doe did, to the great damage of the said John Doe, and against the peace of our lord the now king, &c.— And thereupon the said John Doe, by E. F. his attorney, complains, that whereas the said A on the ..... day of ....., in the ..... year of the reign of our said lord the king, at the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe, and his assigns, from thenceforth, (or from the ..... day of ....., in the ..... year aforesaid) for and during, and unto the full end and term of ....., from thence next ensuing, and fully to be completed and ended. By virtue of which said demise, the said John Doe entered into the said tenements, with the

appurtenances, and became and was thereof possessed for the said term, so to him thereby granted, as aforesaid. And the said John Doe, being so thereof possessed, the said Richard Roe afterwards, to wit, on the day and year aforesaid (or, on the ..... day of ....., in the year aforesaid), with force and arms, &c. entered into the tenements with the appurtenances, in which the said John Doe was so interested, in manner, and for the term aforesaid, which is not yet expired and ejected him the said John Doe out of his said farm, and other wrongs to the said John Doe did, to the great damage of him the said John Doe, and against the peace of our said lord the king; whereof the said John Doe saith that he is injured, and hath sustained damage to the value of 50 pounds, and therefore he brings his suit, &c.

Mr. C. D. (the tenant or tenants in actual possession).

I am informed that you are in possession of, or claim title to, the premises in this declaration of ejectment mentioned, or to some part thereof, and I, being sued in this action as casual ejector only, and having no claim or title to the same, do advise you to appear in next ..... Term, (or, if the premises lie in London or Middlesex, "on the first day of next ..... Term," in his majesty's Court of King's Bench, wheresoever, &c. (or, in the Common Pleas, "in his Majesty's Court of Common Bench at Westminster") by some attorney of that court, and then and there, by rule of the same court to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment therein to be entered against me by default, and you will be turned out of possession. Dated this ..... day of ....., A. D. .....

Yours, &c.

Richard Roe.

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Allen County
4 Hurlbut St.